FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 178

R. E. PECKHAM, Assignee for the Creditors of The Meyer-Kiser Bank, succeeding Thomas E. Garvin, Receiver of The Meyer-Kiser Bank,
and
R. E. PECKHAM, Trustee,

Petitioners,

vs.

FAMILY LOAN COMPANY, a corporation;
FERD S. MEYER, otherwise known as Ferdinand S. Meyer;
FERDINAND S. MEYER, Trustee, otherwise known as Ferd S. Meyer, Trustee;
ROSALYN A. MEYER, otherwise known as R. A. Meyer;
JAMES MEYER;
JAMES MEYER, Trustee;
HOKE T. MAROON, otherwise known as H. T. Maroon;
H. T. MAROON, Trustee, otherwise known as Hoke T. Maroon, Trustee;
SEABOARD FINANCE COMPANY OF FLORIDA, a corporation;
SEABOARD FINANCE COMPANY, a Delaware corporation;
TOWN FINANCE COMPANY, INC., a corporation.

Respondents.

PETITION FOR WRIT OF CERTIORARI
to the United States Court of Appeals
for the Fifth Circuit

(Opinions below are Appended Hereto)

LEO S. JULIAN
Biscayne Building
Miami, Florida

JAY E. DARLINGTON
306 Hammond Building
Hammond, Indiana
Attorneys for Petitioners

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To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

The above named Petitioner respectfully petitions this Court to issue its Writ of Certiorari to said Court of Appeals to review this case, and shows:

Opinions Below.

The opinion of the District Court (S.D. Fla. Miami Division), set forth in the Appendix hereof at page A1 *et seq.*, is reported in:

Peckham v. *Family Loan Co.* (1957) 169 F.Supp. 52.

The opinion of the Court of Appeals is set forth in the Appendix hereof at page A13 *et seq.* It is reported in:

Peckham v. *Family Loan Co., et al.* (5 Cir., 1959) 262 F.2d 422.

Grounds for Invoking this Court's Jurisdiction.

Petitioner's timely filed petition for rehearing was entertained and was denied by the Court of Appeals on April 3, 1959.

This Petition, filed 90 days thereafter, invokes this Court's general jurisdiction to review final judgments of the Courts of Appeals under 28 U.S.C. 1254(1).

Petitioner seeks to invoke this Court's "supervisory powers" for reasons set forth *infra*.

Supreme Court Rule 19(b).
Western Pacific R. Corpn. v. *Western Pacific R. Corpn.* (1952) 345 U.S. 247, 262, 73 S.Ct. 656, 662-663, 97 L.Ed. 986.

Questions Presented for Review.

Petitioner was the unsuccessful plaintiff-appellant in the Courts below, in a creditor's suit seeking to reach assets allegedly concealed by the respondents-defendants in a fraudulent conspiracy.

He does not ask this Court to review the merits of the evidence, findings of fact or conclusions of law in the District Court.

He claims that the special Judge of the District Court (S.D. Fla. Miami Division) exhibited strong *bias and prejudice* throughout the trial, against him and in favor of the defendants, which prevented him from having a fair trial; and that the Court of Appeals, in effect, glossed over this error in its opinion and failed to decide it, though urged in his appellant's brief and also in his petition for rehearing. Accordingly, the questions he presents to this Court are:

(1)

Petitioner's request that this Court may remand the case to the Court of Appeals with directions to specifically *decide* the error he alleges,—that the District Judge's bias and prejudice precluded him from having a fair trial and that a new trial should be ordered for that reason.

If this Court determines to remand the case on this ground, the next question (2) presented by this Petition will become moot so far as this Petition is concerned.

(2)

Petitioner's contention that if the Court of Appeals' opinion be construed as an adequate review and a decision against him on this asserted error of bias and prejudice of the District Judge,—then the Court of Appeals has erred on this point, and Petitioner should have remedy by this Court's reversal with directions to the Court of Appeals to order a new trial on this ground.

Statement of the Case.

In view of the nature of the "Questions Presented for Review," little more needs to be said here than is indicated in the opening paragraph under that heading, *supra*.

Petitioner (plaintiff-appellant below), as trustee for creditors of the defunct Meyer-Kiser Bank of Indianapolis, holds a judgment now totaling more than $1,500,000 against *Sol* Meyer (deceased) and another judgment which he holds in a related capacity against Sol's living son Ferd S. Meyer in the total sum of about $300,000.

He brought this creditor's suit in the District Court under the diversity jurisdiction, alleging in his complaint on the Sol Meyer judgment, and in his subsequent intervening claim on the Ferd Meyer judgment, that the defendants (Ferd, his wife, son and business associates) were and are engaged in a fraudulent conspiracy to thwart collection of these judgments by means of manipulating and concealing capital stock and debentures of defendant Family Loan Company, which securities are equitably the property of said Sol and Ferd S. Meyer and hence should be subjected to these judgments.

In the course of making up the issues in the District Court, petitioner encountered two successive and erroneous adverse rulings which in effect threw him out of court.

He appealed successfully in each instance and obtained reversals from the Court of Appeals (5th), but this consumed five years of time (1949-1954) and much labor and expense in order to stay in the District Court. These appeals are:

(1) Petitioner's appeal from the District Court's erroneous dismissal of his complaint seeking to collect the Sol Meyer judgment:

Peckham v. *Family Loan Co.* (5th Cir., 1952) 196 F.2d 838.

(2) Petitioner's appeal from the District Court's subsequent erroneous judgment throwing out his claim seeking to collect the Ferd Meyer judgment:

Peckham v. *Family Loan Co.* (5th Cir., 1954) 212 F.2d 100.

A full statement of the issues will be found in the latter opinion. See in particular the closing paragraphs of the opinion indicating the complicated and serious issue of alleged fraudulent conspiracy by the defendants, and remanding the case for a full trial (which Petitioner now claims he was subsequently deprived of).

There was no petition for writ of certiorari from either of the above decisions.

After remand from the last appeal, *supra*, supplemental issues were made up by plaintiff's supplemental pleadings alleging that during the pendency of said last cited appeal (212 F.2d 100) the defendants-appellants had converted the *res* which was the *subject matter* of plaintiff's suit, the Family Loan Company stock, by *exchanging* it for a *new issue* of capital stock of *Seaboard Finance Company*. This was done without applying to, or informing the Court of Appeals. Seaboard and related concerns were made supplemental defendants on the charge that from the time of this exchange of stock they aided and abetted the conspiracy of the original defendants.

Printed R. 12-17.

This exchange of stock, which converted the subject matter of the suit from the original Family Loan Company stock to Seaboard stock, was also accompanied by submitting to the *Securities and Exchange Commission* and the *New York and Los Angeles Stock Exchanges*, a contract for exchange of stock between the original defendants and Seaboard containing the false and unexplained recital that there was *no litigation pending* affecting said Family Loan Company *stock*, when in fact all the parties to the transaction (original defendants and Seaboard) knew that said last cited appeal was then in progress.

Printed R. 37-43, 65-69.

These supplemental issues relating to Seaboard and the S.E.C. and stock exchanges are not directly here now for review, but need to be mentioned as showing *the broad and serious character of the issues and charges which the Petitioner asserts were smothered* both in the District Court and the Court of Appeals by the errors here complained of.

The course and nature of the alleged *prejudged attitude* of the trial Judge, and the alleged *abortive trial and miscarriage of justice* resulting therefrom, are illustrated in the last part of the Appendix hereof "Excerpts from Trial Record".

Appendix hereof, A19-A43.

ARGUMENT—

GROUNDS FOR ALLOWANCE OF WRIT.

Summary.

I.

Summary remand should be made by this Court to the Court of Appeals with directions to decide the *basic* and *determinative* error allegedly involved in the appeal,—that bias and prejudice of the trial Judge *throughout the trial* rendered the trial abortive and unjust and requires a new trial.

The Court of Appeals' opinion in effect *fails to discharge its duty to decide this question*, because:

A.

The opinion *glosses over* the alleged bias and prejudice of the trial Judge by treating it in terms of mere *incidental* trial rulings, which, if that were the actual situation, would warrant only a superficial review by the Court of Appeals (which is all it received), and which obviously would preclude the plaintiff-appellant from obtaining a Writ of Certiorari from the Supreme Court.

B.

And what is more serious, the Court of Appeals' opinion does not *disclose* this *underlying* and serious question,—the appellant's assertion that he was aggrieved *not* by *incidental* trial rulings of an ordinary fair Judge, but by the *continual* effect of a *prejudiced state of mind* in the trial Judge, of which the specific rulings were mere harmful *symptoms*.

C.

The legal consequence of the above default by the Court of Appeals, as Petitioner understands the law, is:

Default by a Court of Appeals in discharging its statutory duty and function of deciding alleged errors presented, will ordinarily result in a summary order by the Supreme Court to decide the question, without the Supreme Court going into the merits of the omitted question.

Such a summary order will issue both in discharges of this Court's "*responsibility*" to "*supervise*" the orderly administration of justice in the lower federal courts:

> Supreme Court Rule 19(b).
>
> *Western Pacific R. Corpn.* v. *Western Pacific R. Corpn.* (1953) 345 U.S. 247, 73 Sup. Ct. 656, 662-663, 97 L.Ed. 986;

and also to carry out the purpose of the statute creating the certiorari procedure,—that the Supreme Court should not be burdened in the first instance by default of the Courts of Appeals in failing to fairly and adequately decide questions properly presented to them (whether this fault be a total one as in the case cited *infra*, or a semi-total one as in this case by glossing over and failing in effect to decide an *underlying* and *determinative* question):

> *Anderson* v. *Atherton* (1937) 302 U.S. 643, 58 S. Ct. 53.

If Petitioner be correct in the foregoing ground I, this renders ground II, *infra*, moot.

II.

If the Court of Appeals opinion adequately decides this question of the alleged underlying bias and prejudice of the trial Judge,—then Petitioner urges that its decision is wrong, and wrong on a matter sufficiently important to merit the Supreme Court's attention and remedy, because:

While the factual and legal merits of the case are *not* here for review *as such*, it is proper for this Court to *briefly* notice the Trial Transcript, which has been certified up, sufficiently to see that from the *beginning* to the end the trial was saturated with *prejudice* of the trial Judge against this Petitioner-plaintiff and *sympathy* in favor of these Respondents-defendants, sufficient to make the trial abortive:

Appendix hereof, A19 to A43.

When such a situation appears in the record on appeal, *reversal by the Court of Appeals, for a new trial, is required.* The Court of Appeals (or the Supreme Court when the matter is before it) will not proceed further to inquire whether or not particular *rulings* by a *prejudiced* Judge were correct. The reason is obvious:

N.L.R.B, v. *Phelps* (5th Cir., 1943) 136 F.2d 562, 563-4, 566-7.

Knapp v. *Kinsey* (6th Cir., 1956) 232 F.2d 458, 465, 466-7. Cert. den. 352 U.S. 892.

In re Murchison, 349 U.S. 133, 135, 75 S.Ct. 623, 99 L.Ed. 943.

Ancillary to the last proposition is the point (not so far disputed by the Court of Appeals or the Respondents-defendants) that the operation of the above proposition is not abated or affected by the fact that the aggrieved

party failed to file an affidavit under *28 U.S.C. 144* to disqualify the Judge, where his prejudice "was first disclosed during the trial":

> *Knapp* v. *Kinsey, supra, rehearing* opinion, (6th Cir., 1956) 235 F.2d 129, 131.

This point is particularly applicable here, where the record shows that this trial Judge entered the case as special Judge, a *stranger* to this Petitioner-plaintiff, on the morning the trial started. (See Appellant's Brief, Appendix B, designated to be certified up with the Record).

Elaboration of Argument.

I.

Court of Appeals' Default in Failing in Effect to Consider Question of Trial Judge's Prejudice.

Neither the Court of Appeals or the Respondents-defendants have yet contended, or could contend that this question was not presented and urged to the Court of Appeals.

Appellant's Brief in the Court of Appeals (copies of which he has designated to be certified up to this Court with the Record) sets forth under "Specifications of Errors":

> "Error and prejudice committed and exhibits by the Trial Judge in favor of the defendants and against the plaintiff-intervenor, from near the beginning to the end of the trial, which rendered a fair, impartial and adequate trial and decision impossible. More specifically. • • •"
>
> Appellant's Brief, 30.

Again Appellant's Brief in the Court of Appeals set forth under "Argument", the bold face heading:

> "Adverse Attitude of Trial Judge Made a Fair and Adequate Trial Impossible" (followed by detailed argument).
>
> Appellant's Brief, 48.

The only substantial parts of the Court of Appeals' opinion dealing with the trial Judge's attitude and conduct of the trial are:

> "The contention upon which the appellant places the *greatest stress* is that he was denied a fair and adequate trial by the court's refusal to grant *continuances*, the court's refusal to allow prolonged *questioning* of witnesses, and the court's refusal to require *production* of documents." (Our italics)
>
> Appendix hereof, A14.
>
> "The appellant asserts that he was harassed and belittled by the court. He points to the pages of the record where the court *commented* upon the time consumed by the appellant in developing *immaterial* evidence, and to the court's refusal to permit continued questioning of witness as to matters *previously covered* in detail." (Our italics)
>
> Appendix hereof, A17.

In addition, Petitioner filed a petition for rehearing, with brief appended, which again urged this error to the Court of Appeals in more detail, including citation of the same cases cited under II *infra* of this Petition. But the Court of Appeals denied it without opinion.

As already pointed out under "Summary", proposition I, *supra*, the Court of Appeals' opinion *in effect* defaults its duty to review and decide this basic question of prejudice of the trial Judge by:

(1) Treating the question as one of *incidental trial rulings, and*—

(2) Glossing over, obscuring and ignoring the basic question of *underlying prejudice* of the trial Judge, of which the rulings were but symptoms.

(3) Ignoring the *legal consequences* of this distinction. Incidental trial rulings by an *un*prejudicial Judge seldom merit reversal, because usually they are *discretionary*. But a *prejudiced state of mind* in a trial Judge, if shown in the trial record, *requires* reversal regardless of whether he exercised his (biased) discretion right or wrong in the particular ruling. (See cases under II, *infra*).

II.

Record Facts Show Trial Judge's Prejudice in This Case, and Law Requires Reversal.

If the above proposition I be well taken,—that the Court of Appeals in effect failed to discharge adequately its statutory duty (owed both to this Petitioner, to the Supreme Court and to the Government) to review and decide this basic question of *prejudice* of the trial Judge, then there should be a summary order requiring the Court of Appeals to perform this function, and this proposition II becomes moot so far as the present Petition is concerned.

See authorities under I in Summary, *supra*.

Petitioner's Right to Have a Fair and Unprejudiced Trial Judge Is Fundamental.

This Court of Appeals, in the following case relating to a trial examiner of the N.L.R.B., but equally applicable to a District Court Judge, said:

"* * * a fair trial by an unbiased and non-partisan trier of the facts is of the *essence* of the adjudicatory process as well when the judging is done in an administrative proceeding by an administrative functionary as when it is done in a *court* by a *judge*. * * * Nor will the fact that an examination of the record shows that there was evidence which *would* support the judgment, at all save a trial from the charge of unfairness, for when the fault of bias and prejudice in a judge first rears its ugly head, *its effect remains throughout the whole proceeding*. Once partiality appears, and particularly when, though challenged, it is unrelieved against, it taints and *vitiates all of the proceedings*, and *no* judgment based upon them may stand.

* * *

"We cannot agree with the conclusion of the Board that respondents have had the fair trial by a disinterested and impartial trier of facts which the law accords them. Whatever ought to be said of the examiner's *persistent* and *partisan* efforts to conduct the proceedings to a decision favorable to the Board, if the examiner had been really in the position he assumed that he was in of an agent for the Board to sustain its charges, it cannot be successfully denied that his *general attitude* was not impartial but partial, not disinterested but *partisan*. * * *" (Our emphasis).

N.L.R.B. v. Phelps (5 Cir. 1943) 136 F.2d 562, 563-564, 566-567.

This Court of Appeals followed and quoted the first part of the above language, as being "well said" in *N.L.R.B.* v. *National Paper Co.* (5 Cir. 1954) 216 F.2d 959, 968. The same language was also followed and quoted in *Local No. 3 etc.* v. *N.L.R.B.* (8 Cir. 1954) 210 F.2d 325, 330.

The following case, not involving the N.L.R.B., was a large stockholder's suit, somewhat comparable in general scope to our case. No affidavit of bias and prejudice was filed below, but the Court of Appeals reviewed the question of the District Judge's prejudicial conduct in the trial, basing the review upon fundamental principles of due process, as did this Court in the above quoted *N.L.R.B.* v. *Phelps*, 136 F.2d 562, and citing the *Phelps* case. The Court said:

> "One of the fundamental rights of a litigant under our judicial system is that he is entitled to a *fair trial* in a *fair tribunal*, and that fairness requires an absence of actual bias or prejudice in the trial of the case. *In re: Murchison*, 349 U.S. 133, 136, 75 S. Ct. 623, 99 L. Ed. 942; *Talbert* v. *Muskegon Construction Co.*, 305 Mich. 345, 348, 9 N.W. 2d 572. If this *basic principle* is violated, the judgment *must* be reversed. *In re: Murchison, supra; Berger* v. *United States*, 255 U.S. 22, 41 S. Ct. 230, 65 L. Ed. 481; *Moskun* v. *United States*, 6 Cir., 143 F. 2d 129, 130; *N.L.R.B.* v. *Phelps*, 5 Cir., 136 F. 2d 562.
>
> "Bias or prejudice on the part of a judge may exhibit itself prior to the trial by acts or statements on his part. Or it may appear during the trial by reason of the actions of the judge in the conduct of the trial. If it is known to exist before the trial it

furnishes the basis for disqualification of the judge to conduct the trial. Section 144, Title 28, U.S. Code. This section provides: * * * This statutory provision is not directly applicable to proceedings wherein the claimed bias or prejudice appears *during* the course of the trial. However, there would seem to be close analogy between bias and prejudice which would disqualify a judge from sitting in a judicial proceeding and the bias or prejudice appearing *during* the course of the proceedings which would render the *judgment* therein invalid. * * *

* * * *

"In our opinion, the conduct of the District Judge did not conform to the standard required by the foregoing authorities. Whether unconsciously or otherwise, he failed from the start of the trial to view this case with the impartiality between litgiants that the defendants were entitled to receive. His active participation in the case and in the questioning of witnesses exceeded what was reasonably necessary to obtain a clear understanding of what their testimony was and *fully justifies* appellants' complaint that at times 'he, figuratively speaking, *stepped down* from the bench to *assume the role of advocate* for the plaintiff.' Although appellees' counsel did not ask or need such assistance, and apparently at times realized the possible prejudice to their cause; the prejudicial effect to appellants' rights requires a reversal of the judgment. *Appeal of United States Securities and Exchange Commission, supra,* 6 Cir., 226 F. 2d 501, 519, 520; *Berger* v. *United States, supra,* 255 U.S. 22, 41 S. Ct. 230; *Crowe* v. *Di Manno, supra,* 1 Cir.,

225 F. 2d 652, 659; *Whitaker* v. *McLean, supra,* 73 App. D.C. 259, 118 F. 2d 596; *N.L.R.B.* v. *Phelps, supra,* 5 Cir., 136 F. 2d 562.

"The judgment is reversed and the case remanded to the District Court for a retrial before another Judge." (Our emphasis).

Knapp v. Kinsey (6 Cir., 1956) 232 F.2d 458, 465, 466-7. Cert. den. 352 U.S. 892.

In the last quoted case, there was a later supplemental opinion on a petition for rehearing and to re-tax costs. The Court said:

"In our opinion, *Section 144,* Title 28 U.S. Code was *not applicable* to *this* case in which the claimed bias or prejudice was first disclosed *during* the trial. Under the circumstances the remedy cannot be by a change of judges during the trial; it necessarily becomes *a matter of alleged prejudicial error* and for correction by the Court of Appeals. *Moskin* v. *United States,* 6 Cir., 143 F. 2d 129; *United States* v. *Flegenheimer,* D.C. N.J., 14 F. Supp. 584, 591. We do not agree with appellees' contention that the issue was not timely raised and preserved by appellant during the trial in the District Court."

Knapp v. *Kinsey* (6 Cir. 1956) 235 F. 2d 129, 131.

Questions on the Merits in the District Court Become Moot.

This is the first, and if well taken, the *only* proposition, which requires the reviewing court's consideration when such an error is assigned as in this appeal. The first paragraph of the above quotation from *N.L.R.B.* v. *Phelps*

(5 Cir. 1943) 136 F. 2d 562 says that wherever prejudice in the trier of the facts "rears its ugly head," this—

> "taints and *vitiates all* of the proceedings, and *no judgment* based thereon may stand." (p. 564 top). (Our emphasis).

In like vein, the first paragraph of the above quotation from main opinion in *Knapp* v. *Kinsey* (6 Cir. 1956) 232 F. 2d 458 cites the *Phelps* case and others and says:

> "If this *basic principle* is violated, the judgment *must* be reversed." (p. 465, 2nd column) (Our emphasis).

No Presumption Against Prejudice.

Necessarily implied in these last two cases, is the proposition that in reviewing this preliminary question of whether the trier of the facts was prejudiced, the Court of Appeals does *not* indulge any presumption that the lower tribunal was unprejudicial, but examines the record and holds the scales *itself* on this point. This is indicated in the above cited but not quoted opinion of this Court in *N.L.R.B.* v. *National Paper Co.* (5 Cir. 1954) 216 F. 2d 859 to the effect that where prejudice had appeared in the conduct of the trial,—

> "the Examiner's report and the Board's findings based thereon are *not* entitled to the usual presumption of correctness," though the opinion goes on to say that this is no reflection on the "competency of the examiner on less provocative occasions." (p. 868, 2d column) (Our emphasis).

Similarly, in the following case a Court of Appeals refused "in the exercise of our sound discretion" to grant its writ of mandamus before trial below to review the correctness of the District Judge's ruling that an affidavit

of bias and prejudice was not sufficient to disqualify him. The Court held that review of the Judge's prejudice or non-prejudice should come up later on appeal from the final judgment below, and that—

> "We think it self-evident that a decision by a reviewing court of *this* legal question would have to stand upon its own merits, *unaided by any presumption.*" (Our emphasis).
>
> *Korer* v. *Hoffman* (7 Cir. 1954) 212 F. 2d, 211, 213, 2d column.

Trial Judge's Erroneous Assumption of the Role of Defense Counsel in This Case.

Please observe that in the last part of the above quotation from the main opinion in *Knapp* v. *Kinsey*, 232 F. 2d 458, the Court said that the conduct of the District Judge during the trial—

> "*fully justifies* appellants' complaint that at times he, figuratively speaking, stepped down from the bench and assumed the role of advocate for the plaintiff." (p. 467, 2nd column) (Our emphasis).

But an examination of the record and opinion in the above case will show that the Judge's conduct in that case was mild, compared to the flagrant and unprecedented assumption of the role of defense counsel in this case.

Like the Judge's prejudiced state of mind, of which this conduct is one of the *symptoms* and *results*, this conduct continued from the beginning to the end of the trial (contrary to the erroneous implications which permeate the opinion to the effect that the Judge's conduct and rulings were *isolated* ones, *late* in the trial, and were *justified* in fact and law).

The parts of the record showing this erroneous judicial conduct of the trial Judge are so *numerous*, from beginning to end of the record, that it would unduly extend this Petition and its Appendix to set forth all of them. The Appendix attempts to set forth adequate *samples* from beginning of the trial to the end.

Appendix hereof, A18 to A43, infra.

From the above cited record, we think it is sufficiently apparent that the Judge not only assumed the role of defense counsel, but did so in *the most erroneous and prejudicial manner*. For instance:

The Judge frequently *interrupted* the train of questions by plaintiff's counsel to the *principal defendants* Meyer and Maroon who were on the stand as important *adverse* plaintiff's witnesses.

The questions interposed by the Judge were *highly improper and leading*, frequently putting answers in the mouths of the witnesses, *eliciting self-serving conclusory answers* in favor of the defendants on the main fact issues in the case.

Appendix, A18, A21, A33-4.

When these witnesses gave answers to the Judge's questions, favorable to plaintiff in spite of the leading questions, the Judge frequently asked questions of a kind which would cure these answers and turn the testimony back in favor of the defendants.

Appendix, A33-4.

Much of this interrogation by the Judge was so leading and improper that any fair Judge would sustain an objection to it if done by *defense counsel*. True, plaintiff's counsel did not enter objections to the Judge's questions. No such duty rested upon him under the circumstances.

What should he do? Object on the ground that the Judge was committing judicial misconduct, a fact which the Judge should already know,—and thereby aggravate the existing hostility of the Judge to plaintiff's counsel and case?

Frequently throughout the trial, the Judge also engaged in the unprecedented practice of *making his own objections* to plaintiff's questions to the defendant-witness (even in the absence of objections to these questions by defense counsel), and there sustaining his own objections.

Appendix, A25, A28, A30.

The Judge frequently expressed his *resentment* at plaintiff's questions to the defendant witnesses Ferd S. Meyer and Maroon, when the questions implied or sought to show fraud on their part, though this was the basic issue in the case.

Appendix, A22-3, A27, A36.

The Judge frequently indulged in *sarcasm* and derogatory statements toward plaintiff's counsel.

Appendix, A27, A33, A34.

Abusive Conduct by Defense Counsel.

Defense counsel, taking their cue from the Judge, and sometimes with his encouragement, frequently indulged in highly improper and derogatory remarks toward plaintiff's counsel.

Appendix, A26-7, A33.

"The Poor Old Man Was Broke."

By the time the *middle* (not the end) of plaintiff's case-in-chief was reached, the Judge was *openly expressing*

his sympathy for the allegedly fraudulent and conniving judgment debtor, Sol Meyer, and had expressly adopted the theory argued by the defendants in their *opening statement* (they later rested without putting on any witnesses):

> "The *poor* old man (Sol Meyer) was *broke*. • • • Now what would you have done under the circumstances. • • •"

Appendix, A35.

To the contrary, see the Indiana court's opinion affirming plaintiff's judgment against Sol Meyer and showing how the "poor old man" misappropriated a million dollars from depositors of the Indianapolis bank of which he was *president*, and took it to Florida: *Meyer* v. *Garvin* (1941) 110 Ind. App. 403, 408, 410-13, 37 N.E. 2d 291.

Trial Judge Arbitrarily Cut Off Plaintiff's Case in Chief.

As a natural culmination of the above prejudiced trial, in which the trial Judge and defense counsel alternately berated the plaintiff and his counsel, and sympathetically pre-judged the case in favor of the defendants, there came the unprecedented action of the trial Judge in:

(1) Refusing to receive plaintiff's expert testimony offered to show that Sol Meyer, "the poor old man", *had secretly held the certificate* for at least 47% of the stock sought to be reached by plaintiff, now worth $1,000,000 or more; and then his son, defendant Ferd S. Meyer, or other defendants, had *concealed* and *switched* this ownership after Sol's death.

Appendix, A37-8.

(2) Arbitrarily closing plaintiff's case-in-chief, refusfusing to permit the Petitioner-plaintiff to conclude his direct examination of a principal defendant (Maroon), and refusing to permit plaintiff to call and examine *at all* as his adverse witnesses, two important defendants (Ferd S. Meyer's wife and son, holders of part of the stock sought to be reached).

Appendix, A38-39, A43.

(3) Then deciding the case without permitting any oral argument (being the logical culmination of the Judge's repeatedly expressed pre-judgment in favor of the defendants).

Appendix, A43.

Conclusion.

Wherefore, for each of said reasons, the Petitioner respectfully prays that this Court may issue its Writ of Certiorari to grant him appropriate relief in this case.

Leo S. Julian

Jay F. Darlington

Attorneys for Petitioner.

APPENDIX.

District Court's Opinion.

(Title Omitted.)

This case involves transactions covering a long period of time—from 1930 until the present—and a brief history of the principal facts seems pertinent.

Sol Meyer, when a young man and a resident of Indianapolis, Indiana, married Florence Strauss, the daughter of a wealthy family in Washington, D. C. They began their married life in Indianapolis but, like many others, spent the winter season principally in Miami, Florida, and where eventually they resided permanently. In 1925 or slightly prior thereto, Sol Meyer, with a cousin, Sol Kiser, organized the Meyer-Kiser Bank in Indianapolis, Indiana, and soon thereafter, the Meyer-Kiser Bank in Miami, Florida. In addition to these banking institutions Meyer and Kiser had several other corporations and partnerships dealing in real estate, insurance and short loans.

On May 12, 1931 both the Meyer-Kiser banks were closed and receivers appointed. From 1930 to 1932 banks failed all over the United States, many of them because of the depreciated value of collateral and through no fault of the officers. A suit was filed under the stockholders liability statute by the receiver of the Miami bank against Ferd S. Meyer, son of Sol and Florence Myer, alleging that he was the owner of a large block of stock consisting of 1131 shares in the Miami bank, and on December 30, 1932, judgment was rendered against him for a sum in excess of $100,000. On September 18, 1933, Ferd S. Meyer filed a petition in bankruptcy and received his discharge

March 13, 1934. An action was instituted against Sol Meyer by the receiver of the Indianapolis bank charging misappropriation of funds, and in October, 1938, judgment was rendered in the state circuit court against Sol Meyer for a sum in excess of $800,000, which judgment was affirmed by the Supreme Court in 1941. After recovering said judgment the receiver sued Sol Meyer upon the judgment, in this court, Meyer having become a resident of Miami, and recovered a personal judgment against him in this court on January 30, 1939.

Prior to 1931, at the suggestion of Florence Meyer, Ferd S. Meyer organized the Family Loan Company, a Florida corporation, (hereinafter referred to as the Loan Company), with the capital provided by Florence Meyer. When Ferd Meyer secured the charter he provided for the temporary issuance of stock as follows: Ferd S. Meyer, 98 shares; W. C. Chadwick and A. M. Reder, one share each as qualifying stockholders. At the request of Florence Meyer, on the same day the stock was first issued, it was reissued to: Florence Meyer, 97 shares; Ferd S. Meyer, W. C. Chadwick and A. M. Reder, one share each as qualifying stockholders. But the stock was regarded at all times as belonging to Florence Meyer.

On January 16, 1932, Florence Meyer organized the Florence Meyer Trust (hereinafter referred to as the Trust), providing all of the capital and designating Sol Meyer and Ferd S. Meyer as trustees, and the beneficiaries as Sol Meyer, Jr., Edward Meyer, sons of Sol and Florence Meyer, and James M. Meyer, the minor son of Ferd Meyer. This Trust was created for the primary purpose of providing for the comfort, education and living expenses of Sol Meyer, Jr., and Edward Meyer, who because of physical disabilities from childhood were incapable of caring for themselves. From time to time the

trustees made investments, some of which were made in the preferred stock of the Loan Company, which stock was later recalled and in lieu thereof debenture notes of the Loan Company were issued. The trustees remained the same until the death of Sol Meyer in November, 1939, and thereafter Ferd Meyer acted as sole trustee until James M. Meyer, his son, became of age and was appointed an additional trustee under the terms of the Trust. The Trust funds, as far as the record discloses, were invested in accordance with the best judgment of the trustees, and the funds therefrom were expended for the beneficiaries from time to time.

On March 4, 1949 the present suit was filed by R. E. Peckham, assignee for the creditors of the Meyer-Kiser Bank, succeeding Thomas E. Garvin, receiver of the Meyer-Kiser Bank of Indianapolis. An amended complaint was filed on March 14, 1949, and an intervening claim on May 13, 1949. The complaints and intervening claim alleged the judgment in the Indiana court against Sol Meyer and the subsequent personal judgment against him in this court, the plaintiff succeeding to all right thereunder by assignment from the receiver of the Indianapolis bank. It further alleged that Sol Meyer conspired with the other defendants to conceal his assets from the payment of said judgment in that all, or the major portion, of the capital invested in the Loan Company and the Trust was in fact the property of Sol Meyer, and therefore the assets of the Loan Company and the Trust were subject to the payment of the judgment. That while Ferd S. Meyer filed a petition in bankruptcy and received his discharge in 1934, he fraudulently failed to list as his personal assets his holdings in the Loan Company and therefore said discharge is no bar to an action against Ferd Meyer on the judgment

against him in the Florida Court. That said judgment was assigned by R. E. Peckham by Harold C. Costello, J. H. Chance and Vera Chance, the three stockholders who succeeded to the assets of the Augusta Holding Corporation when it dissolved, said judgment having been purchased by Augusta when the assets of Ferd Meyer, bankrupt, were sold at public auction. The plaintiff seeks to pursue the assets of the Loan Company and subject the interest of all the other defendants in its stock, debentures, notes and evidence of indebtedness to the payment of plaintiff's judgments against Sol Meyer and Ferd Meyer.

The various defendants have filed their answers.

Defendants Rosalyn A. Meyer, wife of Ferd Meyer, and James M. Meyer, their son, deny generally the allegations of the amended complaint and allege that each of them individually has been and is a stockholder of the Loan Company, but both deny that they are stockholders by virtue of any transfer or assignment of anything of value from Sol Meyer to them, and further deny that either of them held any of the stock or debentures of said company in trust for Sol Meyer or his estate, or anyone other than in their own right.

The Loan Company filed its answer denying that Sol Meyer at any itme was ever a holder of record of common or preferred stock or the debentures of said corporation, either directly or indirectly; that Sol Meyer promoted or helped to promote the organization of said company or that he was the actual or equitable owner of any part of the capital which went into said corporation; and further, that Sol Meyer loaned or furnished additional monies or properties to said corporation.

Ferd S. Meyer in his answer individually denies the material allegations of said complaint and specifically

denies that said Sol Meyer had anything to do with the organization or promotion of the Loan Company, or was ever the owner of any of the common or preferred stock or the debentures of said Loan Company; that Sol Meyer ever gave or transferred to him any funds for investment in said Loan Company in any capacity. He admits that judgment was rendered against him individually in the Circuit Court of Dade County, Florida, on December 30, 1932, but alleges that he was duly adjudicated a bankrupt and discharged thereafter in Cause No. 1368-M in this court on March 13, 1934. This defendant further alleges that in his bankruptcy schedules he listed all liabilities of every nature and character including the above judgment and, therefore, the plaintiff is barred not only by the statute of limitations but by his discharge in bankruptcy.

Answering defendant Hoke T. Maroon denies that Sol Meyer beginning in the first part of 1930 and continuing thereafter until his death in 1939, promoted the organization and business of the Loan Company; that Sol Meyer ever owned any of the common or preferred stock or debentures of said company but says that Sol Meyer was an employee of said company on a nominal salary but did not promote the company, was not the directing head, and was not the actual or equitable owner of any portion of the capital which went into said company; that this defendant never received any monies, property or thing of value from Sol Meyer, and did not then and does not now hold anything of value from Sol Meyer, or his estate or his heirs.

The defendants Ferd S. Meyer, James Meyer and H. T. Maroon filed their answer as trustees denying that they have ever, jointly or severally, concealed or assisted in concealing in any manner whatsoever any assets which, either legally or equitably, were the property of Sol

Meyer. They answer as trustees making the same admissions and denials as were made in their individual answers.

On October 25, 1954, the plaintiff filed a supplement to his amended complaint and a supplement to his intervening claim in which he made the following additional defendants: Family Loan Company, a Florida corporation, incorporated on or about October 9, 1953; Seaboard Finance Company of Florida, a Delaware corporation, admitted to do business in Florida on or about March 25, 1950; Seaboard Finance Company, a Delaware corporation, believed to be the parent corporation and owner of the capital stock of said Seaboard Finance Company of Florida; and Town Finance Company, Inc., a Florida corporation, incorporated on or about April 29, 1953. In this supplemental complaint the plaintiff alleges that the original defendant Family Loan Company caused a conversion or change in form of the res or assets sought to be reached in this action from the stock and obligations of one or more of the above-named additional corporate defendants and that thereby the original defendants have converted or attempted to convert the stock and obligations sought to be reached in the original complaint into the stock or obligations of one or more of said additional corporate defendants. And that said transfers were fradulent and made for the purpose of concealing the assets of the original defendants.

In answer to the supplemental complaint the defendants Family Loan Company, a dissolved Florida corporation; Fred S. Meyer, individually and as trustee; Rosalyn A. Meyer; James Meyer, individually and as trustee; Hoke T. Maroon, individually and as trustee; and the additional defendants, Family Loan Company, a Florida corporation organized in 1953 by Seaboard and Town

Finance Company, a Florida corporation, allege that the defendant Ferd S. Meyer and James Meyer, as trustees of the Florence S. Meyer Trust, received payment in full for all debentures of the original Loan Company held by them as trustees and that said monies have been reinvested in debentures of the Town Finance Company. The defendant Hoke T. Maroon, as trustee for his brother, states that he does not hold or ever did hold any property in trust for Sol Meyer during his lifetime or for Ferd Meyer, and does not and has not held title as trustee to any property in which either of them had or has any beneficial interest. The defendants Ferd S. Meyer, Rosalyn A. Meyer, James Meyer and Hoke T. Maroon individually say that for a good and valuable consideration, consisting of capital stock in Seaboard, they with other stockholders of the Loan Company, sold, transferred and conveyed their holdings in said Loan Company to Seaboard Finance Company of Florida or Seaboard, and that these defendants now own the stock so issued to them individually as their individual holdings except for such shares as have been sold by some of the defendants individually upon the open market. These defendants and each for himself individually say that their respective individual holdings of the corporate stock or debentures of the Loan Company were their own property and were never the property of Sol Meyer, deceased, nor of any one claiming by him, through or under him and that neither Sol Meyer nor anyone in his behalf furnished the assets which caused such stock or debentures to be originally issued, and that said defendants' present holdings in Seaboard are not a result of any assets claimable by the plaintiff.

Seaboard Finance Company, Seaboard Finance Company of Florida, and Town Finance Company, Inc., answering the amended and supplemental complaints and

intervening claims deny that they or either of them have become fraudulent transferees of the assets sought to be reached in the amended complaint and intervening claim, and deny that they have joined, aided, and abetted any of the parties hereto in the concealment of said assets. Further answering, these defendants say that the defendant Seaboard on April 20, 1953, entered into a written contract with Ferd S. Meyer and Hoke T. Maroon, individually and as agents for certain stockholders of the Family Loan Company for the purchase by said Seaboard of all the issued shares of capital stock of said Loan Company, copy of which contract was attached to their answer, and state further that said sale was for full and valuable consideration, conducted at arm's length in good faith, without any fraud, collusion or guile on the part of Seaboard, and without any purpose or intent on its part to hinder, delay or defraud the plaintiff and without any knowledge of any fraudulent intent, if any, on the part of Ferd S. Meyer and Hoke T. Maroon.

It is apparent from the pleadings that the sole issues in this case are as follows: (1) Did any of the funds of Sol Meyer, either directly or indirectly, go into the capital of the Loan Company? (2) Did any of the funds of Sol Meyer constitute any part of the capital of the Trust, or did he at any time contribute to the estate of the Trust? (3) Was the bankruptcy proceeding of Ferd S. Meyer legal in all respects, or was it a fraudulent proceeding? (4) Did the defendants or any of them conspire with Sol Meyer, or with each other, to conceal the assets of Sol Meyer or Ferd S. Meyer after the failure of the banks?

The burden of proof is upon the plaintiff to prove the allegations of his original, amended and supplemental complaints and the amended and supplemental intervening claims by a preponderance of the evidence. If Sol Meyer

was not the actual or equitable owner of all or a portion of the assets of the Loan Company and the Trust, and if Ferd Meyer had no interest in the Trust except as trustee, and no interest in the Loan Company until 1940 (as is hereinafter explained), then no recovery could be had against Ferd S. Meyer or the Loan Company. And in that event, no judgment could be recovered against any of the defendants. The fact that Sol Meyer and Ferd Meyer were the trustees of the Trust, if their actions in connection with said Trust were merely as trustees, would not be evidence of any personal financial interest in said Trust.

The trial of this case lasted twelve days. The only witnesses offered by the plaintiff were Ferd Meyer and Hoke T. Maroon, who were cross-examined as adverse witnesses in regard to the organization and records of the Loan Company, the Trust, and all other organizations with which the witnesses had had any connection. They also were examined in detail as to the financial record of Sol Meyer and particularly as to whether or not he was interested in any way in the organization or operation of the Loan Company and the Trust. The evidence was that after the failure of the banks he was practically insolvent, his only income being from nominal salaries and transactions on the stock market.

The stock of the Loan Company, as hereinbefore stated, was originally issued after the preliminary organization as follows: Florence Meyer, 97 shares; and one share each to Ferd Meyer, W. C. Chadwick and A. M. Reder, as qualifying stockholders, or a total of 100 shares. But it was understood at all times that these shares were owned by Florence Meyer. Subsequently 50 shares of Florence Meyer's stock were sold to different individuals but by

October, 1940, said 50 shares had been purchased by the Trust. Florence Meyer transferred her remaining 47 shares to Rosalyn Meyer, wife of Ferd Meyer. About this time Hoke T. Maroon purchased 25 shares of stock from the Trust. Rosalyn Meyer transferred to Ferd Meyer 40-2/3 shares of her 47 shares of stock and the Trust also issued 25 shares to Fred Meyer, as trustee for James Meyer, one of the beneficiaries under the Trust. Rosalyn Meyer also sold to Hoke T. Maroon 5-1/3 shares, leaving her share. When Chadwick and Reder severed their connec. on with the Loan Company they surrendered their two qualifying shares to Florence Meyer, which she reissued to Hoke T. Maroon as qualifying shares, when Maroon became the active secretary and treasurer of the Loan Company. These two qualifying shares held by Maroon and the one qualifying share held by Ferd Meyer were then surrendered to Florence Meyer, were sold by her to the Trust, and were purchased from the Trust by Hoke T. Maroon. Thus on October 19, 1940, the distribution of the 100 shares of the Loan Company was: Hoke T. Maroon, 33-1/3 shares; Fred Meyer, 40-2/3 shares; Ferd Meyer, as trustee for James Meyer, 25 shares; and Rosalyn Meyer, one share, which constituted the entire capital stock of the Loan Company.

Approximately 1946, Harry J. Herff, Charles T. MacDermott and James A. Dunn became stockholders and directors of the Loan Company, each one purchasing two per cent of the capital stock, which had been surrendered two per cent from Hoke T. Maroon and four per cent from Ferd Meyer.

During this time the stock was increased from 100 shares to 91,000 shares but the distribution remained in the same proportion as above indicated. In 1953 the stockholders of the Loan Company made a contract with Sea-

board, whereby they surrendered their 91,000 shares of stock in the Loan Company for 60,000 shares in Seaboard, which shares were divided among the stockholders in proportion to the stock held as indicated above.

When the exchange of stock was made with Seaboard, Ferd Meyer and Hoke T. Maroon organized the Town Finance Company and the former stockholders of the Loan Company, who were so inclined, invested in the Finance Company either in stock or debentures.

There was no evidence introduced that Sol Meyer ever had any interest, either directly or indirectly, in the Loan Company or the Trust, except as a trustee. And the evidence showed that the only interest Ferd Meyer had in the Loan Company other than the one qualifying share was after October, 1940, by virtue of the stock which was given him by his wife, Rosalyn Meyer.

From the preponderance of the evidence, the Court finds that Florence Meyer was the sole contributor to the assets of the Florence Meyer Trust, and that it was organized for the purposes above indicated.

The bankruptcy proceedings of Ferd Meyer have been attacked in the pleadings of the plaintiff, alleging that Meyer did not disclose all of his assets in the bankruptcy schedules, and particularly his interest in the Loan Company. The complete bankruptcy file was offered in evidence. The pleadings admitted the judgment against Ferd Meyer in the state court for a sum in excess of $100,000, and filing of the petition in bankruptcy on September 18, 1933, and the discharge on March 13, 1934. Ferd Meyer testified that he listed every dollar of his assets; that he had no interest in the Loan Company except the one qualifying share which actually belonged to his mother, and that he became a stockholder in 1940 when he received 40-2/3 shares from his wife, Rosalyn Meyer.

The Court finds that the bankruptcy proceedings were regular; that there is no evidence that Ferd Meyer did not disclose all of his assets; and that the discharge in bankruptcy is a bar to any recovery sought in this case as to Ferd Meyer.

The Court further finds that the plaintiff has failed to show by a preponderance of the evidence, or by any credible evidence, that there was a conspiracy between Sol Meier and Ferd Meyer and the other defendants, or any of them, to conceal the assets of either Sol Meyer or Ferd Meyer.

The Court further finds that the transaction between the stockholders of the Loan Company and Seaboard was free from fraud and was a legitimate transaction.

At the conclusion of the introduction of evidence on behalf of the plaintiff, the defendants offered no evidence but moved for judgment on the record.

The motion is sustained and judgment is rendered for all of the defendants. Findings of fact, conclusions of law, and a proper form of judgment, consistent with this opinion, may be submitted.

EDGAR S. VAUGHT
United States District Judge

Dated this 19th day
of March, 1957.

(Clerk's Tr. 1662-1673)
R. 162-163

Decided Jan. 20, 1959.

Rehearing Denied April 3, 1959.

Before RIVES, TUTTLE and JONES, Circuit Judges.

JONES, Circuit Judge.

On March 1, 1959, the appellant commenced the suit which is now before us on appeal. Under the former equity practice the complaint would have been called a creditor's bill. The case has been before this Court on two other occasions. Peckham v. Family Loan Company, 1952, 196 F.2d 838; Idem 1954, 212 F.2d 100. The last of the pleadings was filed on November 19, 1954, and the cause was then at issue. The issues are made apparent in the prior opinions of this Court and in the reported opinion of the district court: Peckham v. Family Loan Co., 52 F.Supp. 169. Nearly two years later, on November 7, 1956, notice was given that the case was set for trial on February 25, 1957. A pretrial conference was had on January 31, 1957. At the pretrial conference the motion of appellant, filed September 15, 1950, was discussed and rulings were made by which production was required of most, but not all, of the documents requested by the appellant. At the pretrial conference one of appellant's counsel stated that he would be unable, because of other cases pending in other courts, to prepare this case for trial within the time remaining before the trial. The court indicated its view that there had been and would be ample time and opportunity for preparation and that a motion for continuance, if made, would be denied. Such a motion was made and was denied. The trial lasted twelve days. The reporter's transcript of the trial is in thirteen volumes with an aggregate of 1480 pages. At the conclusion of appellant's case the court announced that judgment would be entered for the appellees. A motion for a con-

tinuance, then made by the appellant, was overruled. A judgment was entered for the appellees. The appellant moved for a new trial and his motion was denied. In addition to the court's opinion, cited *supra*, findings of fact and conclusions of law were made in which the matters set forth in the opinion were in some respects amplified. On this appeal from the judgment the appellant raises a number of questions.

[1, 2] The contention upon which the appellant places the greatest stress is that he was denied a fair and adequate trial by the court's refusal to grant continuances, the court's refusal to allow prolonged questioning of witnesses, and the court's refusal to require production of documents. The granting or refusal of a motion for a continuance rests within the sound discretion of the trial court and its ruling on such a motion will not be disturbed on appeal unless an abuse of discretion is shown. Girard Trust Co. v. Amsterdam, 5 Cir., 1942, 128 F.2d 376. When the case was set for trial it had been pending for more than seven and a half years, the last pleading putting the case at issue had been on file for nearly two years, and more than three and a half months remained before the trial during which preparation could have been made for it. Although it was stated that one of appellant's counsel had other cases requiring his attention, it was not shown that these matters prevented the making of proper preparation for trial. See 17 C.J.S. Continuances § 38, p. 219. Clearly there was no abuse of discretion in the denial of the motion during the trial. As the trial was concluding a continuance was sought for the purpose of calling as witnesses two of the defendants. They were not subpoenaed and no statement was made as to what testimony was expected from them. A continuance was also sought to secure the testimony of a person who was ill. No sub-

poena was issued for this person, no effort was made to procure his deposition and no statement was made as to the evidence expected from the person whose testimony was desired. It was also asserted that the continuance was needed to permit the appellant to procure from some of the appellees documents to be used as evidence. It was not known to the appellant what these documents would disclose and no adequate reason was given for failure to make an earlier effort to make them available. A court could not be expected, under the circumstances here shown, to delay or continue a trial in order to permit a party to make preparation for trial. Agronofsky v. Pennsylvania Greyhound Lines, 3 Cir., 1957, 248 F.2d 829. There was no abuse of the trial court's discretion in denying the applications of the appellant for continuances.

The appellant specifies error because of the court's pre-trial ruling denying the request for the production of documents in the possession of one or another of the appellees. Those which the court declined to require the appellees to produce were determined by the court to be irrelevant. So also does appellant complain that the court denied his requests made during the trial for production of documents which the court held were not relevant or were shown not to be in the possesion of the appellees. No error is made to appear.

[3] The first witness called by the appellant was the appellee, Ferd S. Meyer. On the third day of the trial, while this witness was on the stand, counsel for the appellant was directing his inquiries to the partial assignment of a certificate for forty-seven shares of Family Loan Company stock. The assignment was made in 1940 and was of shares evidenced by a certificate in the name of Rosalyn Meyer, the wife of the witness. It was suggested by appellant's counsel that the signature of a witness to

the assignment had been removed by ink eradicator and another signature added. The witness had no recollection of the use of any ink eradicator. The court asked what difference it made and counsel answered that it made a great deal. Being again asked he answered that "it is elementary in the books that any alteration of an instrument, particularly unexplained by the signor, is in itself a badge of fraud or possible badge of fraud." Without any effort being taken or thereafter made by the appellant to show the materiality of evidence of eradication or alteration of the instrument, the trial proceeded through eight more days. As the appellant's case was winding up his counsel said he had arranged to have an expert witness attempt to determine and demonstrate whether the signature of the attesting witness had been eradicated and if so, to attempt to restore it. It was proposed that this experiment would be conducted in the courtroom. Counsel stated that he had reason to believe the expert could show the signature was not that of Ferd S. Meyer but of his father, Sol Meyer, who had died prior to the date the assignment bore. It was the theory of the appellant, as stated in its brief, that Sol Meyer had Rosalyn Meyer endorse the certificate in blank, signed it as a witness and kept it as his own until his death. The trouble with this theory is that there was no evidence introduced to support it. The trial court concluded that if the experiment was made and the result was as the appellant predicted it would make no difference. The court declined to delay the trial and permit the experiment to be made. We think there was no error in the court's ruling. If the fruits of such an experiment would have been material the proposal to have it made should not have been postponed until the trial was concluding; if immaterial it would have been properly rejected at what-

ever stage of the trial it had been proposed.

[4, 5] The appellant asserts that he was harrassed and belittled by the court. He points to the pages of the record where the court commented upon the time consumed by the appellant in developing immaterial evidence, and to the court's refusal to permit continued questioning of witnesses as to matters previously covered in detail. It is the judge who presides at a trial. He is not only empowered to keep a case moving within the bounds of reason but it is his duty to do so. See 53 Am.Jur. 87, Trial § 97. Such admonition of counsel as may be required for this purpose is proper. 53 Am.Jur. 83, Trial § 90. There was no improper conduct or comment of the trial judge.

[6] The trial court declined to hear oral argument of counsel at the close of the trial. This, the appellant says, was error. If argument is granted in a non-jury case it is as a privilege and not as of right. The matter of permitting argument is within the court's discretion. 89 C.J.S. Trial § 576, p. 353. Here the court had concluded that the appellant had produced no evidence of the fundamental allegations of his complaint. The court's opinion shows that it had full knowledge of the facts alleged and of the facts proved. There was no error in the court's refusal to hear argument.

[7] It is claimed by the appellant that he had made a prima facie case by the evidence produced and that it was error to enter judgment for the appellees. We cannot agree. The judgment, we think, was a proper one. See Peckham v. Family Loan Co., D.C., 109 F.Supp. 52. There was no error in overruling the motion for a new trial which raised the same questions as are presented on this appeal. Other questions raised need not be discussed. The judgment of the district court is free from error and is

Affirmed.

Note: In the following pages it will be apparent that the bold face headings are not part of the Record but are Petitioner's indication of what he thinks the quoted Record shows. Matter in parenthesis is interpolated to connect the quoted part with the preceding Record. All italics are ours.

Trial Judge Assuming Role of Defense Counsel, interrupting Plaintiff's Examination of Defendant-Witness Ferd S. Meyer:

Q. (by plaintiff's counsel on direct, to defendant-witness Ferd S. Meyer) I am not talking about investments. I mean, did she Florence Meyer, engage, take part in *any* kind of *business* that you recall?

(Florence was the wife of judgment debtor Sol Meyer,—it being the defendants' contention that she, rather than Sol, organized Family Loan Company and originally owned its capital stock sought to be reached in plaintiff's suit as the concealed property of Sol).

A. I don't recall her having *any* regular job *any* place.

Q. You do recall that regularly she was *home taking care of the family?* Is that correct?

A. *That was her primary business, yes.*

"The Court: Do you recall whether or not your mother had an *independent estate* at that time?

The Witness: Yes, she did.

The Court: Her parents were *wealthy people?*

The Witness: *They were.*

Q. (by plaintiff's counsel), Mr. Meyer, from what source did she get this independent estate?

A. *I don't know.*

The Court: Did she *inherit* it from her parents or did she . . .

The Witness: *I do not know*, Your Honor. I know she was a very thrifty woman and I know she saved her money. Where she may have accumulated monies from, *I don't know* and I never did know. I know she always had monies that she was willing to *give me* when my father turned me down. (Our italics).

Trial Tr. 108-9.

Judge Exhibits Bias, and Prejudges a Major Issue:

The Court: (to plaintiff's counsel during direct examination of same witness Ferd S. Meyer): Is it *your contention* now that any part of this *Florence Meyer Trust*, the capital of that trust, *came* from the bank *or from Sol Meyer?*

Mr. Darlington: It is our contention that *every penny* that was ever in it, except maybe a little jewelry of slight value, *was Sol Meyer's money* and was put in . . .

The Court: That is perhaps an *imaginative result*. There is no evidence *so far* that that occurred. (Our italics).

Trial Tr. 133.

Judge Again Exhibits Bias in Favor of Defendants:

Q. (plaintiff's direct examination of same witness Ferd S. Meyer): Are you able to give us any *explanation* as to why Chadwick *signed* the minutes as *chairman* which you identified on the second page and *then his name had been crossed out* of the list of those present?

A. *No. I can't.* He may have been present. It occurs to me that that's about the time Mr. Maroon was taking over the active operation of the Family Loan Company from Mr. Chadwick. Mr. Chadwick had been more or less the supervisor up to them, and I think from that time forward Mr. Maroon took over.

The Court: How is that material?

Mr. Darlington: Your Honor, in this kind of a case, a plaintiff cannot expect any direct admissions against interest by the witness and . . .

The Court: You ought to base it on something other than *just mere suspicion*, you know.

Mr. Darlington: It is something other, and let me refer your Honor to that famous statement of Justice Storey which is quoted in so many of the cases to this effect: Concealment and secrecy are the handemaidens of fraud. Very seldom can a plaintiff produce direct proof or testimony of fraud, but circumstances which may appear trivial in themselves may in their corelation with other circumstances in the case ultimately produce conviction exceeding all testimony.

The Court: While that is very important, nothing is more important than to *charge a man with fraud unless you are able to prove it.*

Mr. Darlington: I consider that the charges were well-founded at the time the complaint was filed, and as my

investigation proceeds and the evidence develops, I am increasingly convinced of that and I hope to be able to convince your Honor. Of course, it would not have been appropriate for me in the opening statement to list a great many separate details that I expected . . .

The Court: *There is nothing in what you have produced here this afternoon* getting down to facts. There is not a single statement there which you could construe as fraud in any way.

Mr. Darlington: It is not merely the written statements. It is the fact that *there is a certain pattern* of alterations. I am not asking Your Honor to make a finding upon these alone. Naturally, I expect to produce a further pattern of alterations and circumstances arising partly from the records of the defendants and partly from their testimony, the circumstances contained in their testimony.

The Court: Very well. *Let us get along* and let us *have the evidence*. (Our italics).

Trial Tr. 170-172.

Judge Again Intervenes with Leading Questions to Defendant-Witness Ferd S. Meyer and Draws Self-Serving Answers on Ultimate Fact Issue.

The Court: (during plaintiff's direct examination of same witness Ferd S. Meyer): At this point, this may have been covered by your testimony yesterday, but I think the question was asked you, to your knowledge *did Sol Meyer* (witness father and judgment debtor) *make any investment* in the *stock* of the Family Loan Company?

The Witness: *No*, sir, he did not.

The Court: *Ever* at any time?

The Witness: *Never* at any time.

The Court: Did *you*, (also a judgment debtor) make an investment in the loan company *prior* to the time that *you* and your associate *assumed* the *active* management of this company? Was there any investment made in that?

The Witness: No, sir. That was all that was put in. I had one share which my *mother gave me* as a part of the qualifying shares, and which was *disposed of by me about a year after she gave it to me*. Except for that one share, I had nothing invested in the Family Loan Company *until Mr. Maroon and I were interested in it in 1940*. (Our italics).

The Court: You may proceed. (Direct examination continued).

Trial Tr. 217-18.

Judge Considers Plaintiff's Question to Defendant-Witness concerning latter's Fraud is "Ridiculous" and "Out of Line".

Q. (plaintiff's direct examination of same witness Ferd S. Meyers): This *certificate No: 10* is endorsed on the back "Ferdinand S. Meyer surviving trustee." That is *your* handwriting, is it not?

A. Yes, it is.

Q. It is written in *pencil*. Is there any reason for your writing it in pencil rather than pen?

A. No special reason.

Q. For instance, was it written in pencil to show that the signature could be—

Mr. Bonsteel: Your Honor, we cannot hear counsel.

Mr. Darlington: I am sorry.

Q. Was it written in pencil for the *purpose* of making the signature *so it colud be erased* at a later date if desired and another name such as Sol Meyer's name as trustee substituted?

Mr. Ward: *If your Honor, please.*

The Court: *I think the question is ridiculous.* I do. *I think your question is out of line.*

Mr. Darlington: If your Honor please, there will be other evidence . . .

The Court: I understand, but I do not think you have *any right to ask a witness if he is a crook on the witness stand.* He is *your* witness now. (Our italics).

Trial Tr. 233-4.

Judge: "What difference" if Ink Eradicator was used on Defendant's Certificate of Stock Sought to be Reached by Plaintiff. "Let's go to Something Else."

Q. Mr. Meyer, will you please think back and tell us if you recall anything about you yourself using any ink eradicator at that place. (On stock Certificate No. 7 allegedly fraudulently transferred to cheat plaintiff).

A. No, I do not.

The Court: That answers your question.

Q. Are you able to say positively whether you did or not use—

A. I have no recollection of using any ink eradicator. I don't know.

Q. Did it ever come to your knowledge that Hoke T. Maroon had used any ink eradicator there?

A. No, sir. I know of no one; no one at all.

Q. No one at all who used ink eradicator?

A. I know of no one. I know nothing about it.

Q. At the time you signed your name over that place, did it come to your attention that ink eradicator had

blotted out part of the green engraving at the place where you were signing?

A. I wouldn't know whether I noticed it or not. It wouldn't mean anything if I did.

Q. Did it?

The Court: *What difference* would it make?

Mr. Darlington: It makes a great deal.

The Court: What is it? *Let us know what it is.*

Mr. Darlington: In the first place, let me say, Your Honor, *I do not think that Your Honor should very far interrogate me along these lines and compel me to—*

The Court: Just a minute. Let us get down to the fact. You asked him the question if he knew anything about it, and he said he did not know anything about it; that he did not remember anything about it. What more can you ask him on that? He answered your question.

Mr. Darlington: If Your Honor please, I did not intend to ask him any more along that line. *Your Honor asked me what difference it made,* and the answer was going to be from me that first it is *elementary* in the books that *any alteration* of an instrument; *particularly unexplained by the signor,* is in itself a *badge of fraud* or possible badge of fraud.

The Court: Let us go to something else. He answered your question.

Defendants' Counsel Starts Personal Attack on Plaintiff's Counsel.

Mr. Darlington: Mr. Ward, *I accept your tender.* Will you *please hand me the stock book and stubs and cancelled certificates covering the period from 1940 to 1950?*

Mr. Ward: Mr. Darlington, you are playing on words. You are not being fair to me and *not being fair to the Court.* You know that *those are not available.* They *have*

not been available. All *others* were available. I *was talking* about the accountant's records. You are trying to impose upon this Court the idea we are holding out about five or six years of some cancelled stock certificates that you know no one can find, and you have been advised of that.

I think, your Honor, *this man's attitude* before the Court and before counsel *should be brought into this record.* He has *not complied with a single ruling* that Your Honor has made when Your Honor told him today what you wanted to be produced, and *he has not even paid any attention to Your Honor's instructions* as to how to proceed in this case.

The Court: Let us get along.

Mr. Darlington: *Thank you,* Your Honor. I will.

Judge Makes his own Objections and then Sustains Them.

Q. (plaintiff's direct to same witness Ferd S. Meyer): You do recall they (stock certificates issued to dummies for Florence Meyer Trust) were *specifically* set up that way. Now, just tell us *what events* you recall.

The Court: He has told you what happened. Your question now is purely *argumentative.* He *has* related exactly what happened as he remembers it.

Mr. Darlington: *But I want to get all the facts as to who said* and *did* what and *who did* it.

The Court: No. *An objection will be sustained by the Court.* It is immaterial.

Mr. Darlington: If Your Honor please, I expect to prove the materiality of these circumstances before I get through. I expect to support my theory that *these were five dummies* that were put on this stock record *to cover up Sol Meyer's ownership of this stock.*

The Court: *Objection is sustained.* It is immaterial. *Your statement is out of line.* Trial Tr. 286-7

Defendants' Counsel Renews Personal Attack on Plaintiff's Counsel—Court thinks Plaintiff's Direct Examination is "Ridiculous".

Q. (plaintiff's direct, same witness Ferd S. Meyer): You were *president* at that time. Your father was dead?

A. *I sold a lot of Seaboard stock* (sought to be reached in plaintiff's suit). I *haven't the slightest idea what I may have sold or bought,* and *I don't know what I paid for it* much later than that. I don't know.

Q. Your father on this date had passed away, and you were the sole surviving trustee. Is that right?

A. That's right.

Q. You were the only representative that this trust had. Your mother and father were dead. You were the *surviving trustee.*

Mr. Ward: If Your Honor please, this is arguing.

The Court: Yes. That is pure argument.

Mr. Darlington: I will withdraw it. I want to find out *what his recollection is* as to *whether* (co-defendant) *Hoke Maroon* gave him *as trustee* of this trust *one dollar or ten thousand dollars* or what.

Mr. *Ward:* Let me just *speak for a minute. This man* here, this *gentleman, so-called,* from Indiana, *got the permission* of this Court *to appear down here.* I have been in this Court for thirty-five years, and *I have never heard anything like this before. He* will *not pay any attention* to what Your Honor rules, and what Your Honor says. He has *had* these papers *all submitted* to him. There are *final figures* on record, and he just keeps on trying to harass this witness. There are other defendants in this case, and we respectfully *ask that the Court restrict his so-called cross examination* of his own witness when *he knows* that the facts and the records and the evidence, the stipulated facts, are all here. He is just trifling with the Court.

The Court: Gentlemen, it is always embarrassing for the Court *to reprimand an attorney in court.* But I think a *lawyer with the practice that you have ought to know how to conduct yourself in court,* and I do not hesitate at all to say to you, sir, that many of these questions are not only immaterial, but *they are bordering on the ridiculous.*

You ask him the question as to whether he signed it. He answers you "Yes." Then you ask, "*Why* did you sign it?"

That is purely argumentative.

Mr. Darlington: May I say this: *I have been attacked here in a personal way by Attorney Ward. Somebody needs to be reprimanded,* but it is Mr. Ward and not me, *and I will not pursue that further.* If Mr. Ward wants to make that kind of record for himself, all right.

Now, then, as to me, Your Honor, I have been working as *hard,* as *respectfully,* as I know how to do it in thirty years of practice, *and every question I have asked has had a purpose,* and when the Court requested it, I have indicated the purpose.

Simply because I am trying to put in *circumstantial* evidence *or make a record on it,* at least *under Rule 43C and D* does not mean that I should be reprimanded.

The Court: No. I do not want to reprimand you at all. I just want you to limit your questions to the issues in this case. I think you have gone entirely too far on some of your *cross* examination. It is repetitious.

We will take a recess at this time. (Our italics)

Trial Tr. 328-330.

Judge again Makes and Sustains Objections to Plaintiff's Direct Examination on Exchange of the Stock sought to be Reached in Plaintiff's Suit.

The Witness: (same witness Ferd S. Meyer, direct): We had the usual talk about the loan business *in general*. Then he told us the fact that he had sold his companies recently in New York, in the New York area, to Seaboard.

He said, "I think *I can get you fellows a similar deal*, which I consider a very good one."

We said, "We are always interested in listening to what anybody has to offer us."

He made *certain suggestions*. He made certain long-distance calls, and *that's about the substance* of the arrangements that were eventually made which *resulted* from those conversations.

The Court: Was anything definitely said in that as to the terms under which you would make a sale?

The Witness: Yes, that we would exchange our stock in the Family Loan Company (sought to be reached by plaintiff's suit) for stock in the seaboard Finance Company, for which *we would get so many shares* of Seaboard Finance Company stock for each share that we had in Family Loan Company stock. The deal eventually resulted in a total amount of sixty thousand shares of stock of Seaboard in exchange for, I think, our ninety-one thousand shares of Family Loan Company.

* * *

Q. You say he stated he thought he could get a *similar deal* for you (to exchange stock sought to be reached by plaintiff). Did he tell you *the nature of the deal* that he had made with Seaboard?

A. He did.

Mr. Bonsteel: If the Court please—

The Court: I think now you are going too far. He has answered your question and told you what the con-

versation was and what the final deal was. I do not care what kind of clothes they had on when they were talking or whether or not they were *bare-headed* or *had on suits.* Those things are immaterial.

Mr. Darlington: If your Honor please, I have not asked questions of that character. The *sale of the res,* the property, the stock sought to be reached in this case, is directly in issue under the complaint and supplemental complaint, the intervening claim and the supplemental intervening claim. Here is—

The Court: What is it that you want to ask him now?

Mr. Darlington: I want *everything that was said between those men in that meeting that he remembers.*

The Court: *You will not be permitted to do that.* He has told you the substance of that conversation, what they said generally. *To ask him what each one said, I am not going to permit you to go that far.*

Mr. Darlington: If Your Honor please, let me respectfully *move the Court to reconsider* that ruling on this ground. That with any witness, and particularly an adverse witness, under Rule 43C and D, I am not shut off—

The Court: Just a minute now. He has told you what occurred there. I will not permit you *go to fishing* all over the place.

Mr. Darlington: May I at least, Your Honor, *make my record here?* I am in the process of moving the Court to reconsider the preceding ruling and stating the grounds for it, as I was—

The Court: No—

Mr. Darlington: It is on the ground—

The Court: I am not going to permit you to do that. *I want you to go ahead with this lawsuit.* We are just wasting time here. That is all there is to it.

Mr. Darlington: Your Honor, I respectfully urge that I should at least be permitted to *state the grounds*—

The Court: *I do not care to hear that at all.* There is no basis for it. (Our italics.)

Trial Tr. 381, 382-4.

Judge, on own Motion Shuts off Plaintiff's Direct Examination of Defendant Regarding his Dealing with S.E.C. concerning Stock Sought to be Reached.

Q. (Plaintiff's direct, same witness Ferd S. Meyer): You *mentioned* the getting of the *Securities and Exchange Commission's approval* (for issuance of the exchanged stock sought to be reached by plaintiff). What part did *you* have in getting that approval?

A. None at all.

The Court: How is that material? It is *not* at all. It has *nothing to do* with the case.

Mr. Darlington: I think it does.

The Court: I know you do, but the Court thinks differently. *Do not pursue that any further.*

Trial Tr. 410-11.

Court on own Motion Shuts off Plaintiff's Examination of Defendant regarding latter's Disposal of part of stock sought to be Reached.

Q. (Plaintiff's direct, same witness Ferd S. Meyer): *With whom* have you had transactions relative to that thousand or two thousand shares (of Seaboard stock sought to be reached in plaintiff's suit)?

The Court: *What difference* does that make? How is that material?

Mr. Darlington: It might bear upon *the true ownership* or, I think, it would furnish a *circumstance* in this entire picture showing where the truth lies.

The Court: It is immaterial what he did with it. He testified he got it.

Mr. Darlington: His *ownership* is in issue.

The Court: He has told you he does not have it—he sold it, *disposed of it.*

Mr. Darlington: He did not say he sold it. He said he *disposed* of it in *some* manner, as I understood it.

The Witness: I meant that I sold it through a *New York Stock Exchange* brokerage house.

Mr. Darlington: *Named what?*

The Court: *We will recess* and reconvene at two o'clock.

Trial Tr. 419-20.

Judge, in Adverse Attitude, Shuts off Plaintiff's Direct Examination of Defendant-Witness Maroon concerning Defendants' Conduct with S.E.C. regarding Stock sought to be Reached by Plaintiff.

Q. (plaintiff's direct examination of defendant-witness *Maroon*): Without going into other documents at the present time, is it also true that neither you nor Ferd Meyer nor anybody on the Family Loan side *played any part* in the filing of any papers with the *Securities and Exchange Commission* relative to this sixty thousand shares of *Seaboard* stock?

Mr. Budd: I will object to the question as being repetitious and immaterial.

The Court: Objection sustained. It is *immaterial.*

Mr. Darlington: It is at least not repetitious.

The Court: It is immaterial.

Mr. Darlington: It goes to the *circumstance* that *if* these gentlemen *concealed the existence* of this case from the *stock exchanges or the SEC*, it is a *circumstance* constituting a strong *admission* by them by *conduct* against interest.

The Court: The Court is through with that. *There is nothing to your contention, sir.* I would like to have some evidence in support of your allegations.

Mr. Darlington: Well, all I can say is that—

The Court: You have alleged here—

Mr. Darlington: All I can say is I think what I have offered *would furnish strong circumstantial evidence* in addition to what is already in.

The Court: There is nothing there that even bears on this other question. The question is, what money, if any, did *Sol Meyer* put into this Family Loan corporation or into this trust.

Mr. Darlington: If Your Honor please, it is our theory, at least, that *conduct* of this kind by Sol Meyer's *transferees* or by *Ferd Meyer*, speaking of the intervening claim, is a *strong implied admission of guilt.*

The Court: No, there is nothing to that at all. *There is no basis for your statement.*

Trial Tr. 482-3

Judge joins Defense Counsel in Personal Disparagement of Plaintiff's Counsel.

Q. (plaintiff's direct, same witness—defendant Maroon): Do you know the source from which these two stock books that we have here, Exhibit 1 and Exhibit 2 and Exhibit 2 is the first common stock book and Exhibit 6—Do you know the *source from which those came to Attorney Ward's office*, where I saw them first briefly the afternoon of January 31 of this year, as has been mentioned?

Mr. Budd: (one of defense counsel): Your Honor, I will object to that question.

The Court: Yes, I think so.

Mr. Budd: I want the Court to know that this attorney was present and opened the box containing all of

these exhibits himself. He knows from the address and return address on those things exactly where those documents came from.

Mr. Darlington: Mr. Budd is half right and half wrong.

The Court: It is immaterial. The question is immaterial.

Mr. Darlington: Your Honor, a statement has been made here *which reflects on my personal veracity*, and I just want to *clarify* it.

The Court: *I do not want to hear* any more about it. I want to try the issues in this lawsuit.

Mr. Darlington: So would I.

The Court: Let us get along.

Mr. Darlington: Every so often *I have to defend myself* against some personal reflections.

The Court: *There might be some ground for it*, but let us get to something else. I do not care to go into that.

Mr. Darlington: Does Your Honor have in mind anything which Your Honor thinks is *ground* for these personal reflections of counsel on me? If so, I would like to know *what* it is.

The Court: I have no idea at all about it.

Trial Tr. 522-3

Judge takes over Defendant-Witness Maroon with Leading Questions on a Main Issue—then Disparages Plaintiff's Counsel again.

The Court (taking over defendant-witness Maroon during plaintiff's direct): Let us go ahead with it.

In that connection, I think it is already in evidence—I am not sure whether I asked you this question or not, but you have been connected with this Family Loan from its beginning, have you not?

The Witness: Almost from its beginning, Your Honor. I do remember definitely from 1933.

The Court: Do you know of any money that was ever put into the Family Loan Company prior to 1940 as capital, *except* the $1,000 *furnished by Frances Meyer?*

The Witness: Florence Meyer, Your Honor, provided *the* original $1,000.

The Court: Florence Meyer, yes.

The Witness: There were certain investments in preferred stock certificates—

The Court: I am just talking about the capital stock now.

The Witness: That's all that was provided, Your Honor, $1,000 from Florence Meyer.

The Court: Were you *there* at that time?

The Witness: *No*, Your Honor. That happened *before* I came in.

The Court: But *that* is as you *remember* it?

The Witness: As I remember the *records*, it *showed* that $1,000 had been provided by Florence Meyer, and there is no other capital funds that were put in. The capital, the common capital of the company, remained at $1,000 until 1939 or '40.

The Court: Proceed.

Mr. Darlington: I wish to point out, to keep the record clear, that under Rule 43, or under other elementary principles of evidence in trials, *I am not bound* by the categorical statement of this witness.

The Court: No, no. *Your attitude* in this case is that you have put these witnesses on the stand but that *you do not believe anything that they said.*

Mr. Darlington: That is not an accurate statement of my attitude.

The Court: But you are not bound by anything that they say.

Mr. Darlington: I have a right to contradict and im-

peach their statements in full or in part, and I am relying on Rule 43 and related principles.

The Court: Let us go ahead.

Trial Tr. 531-3.

Judge Refers to judgment debtor Sol Meyer as "The Poor Old Man was Broke",—thereby disclosing Bias and Sympathy in favor of the Defendants and Prejudging a basic fact issue in the case.

Mr. Darlington: May I respectfully urge that this *stock* is material.

The Court: Not one bit of it unless you can show that Sol Meyer had some interest in this stock, some of his money went into it or some connection, none of this would be material, and I have permitted that that go in on the theory that you are attempting to connect Sol Meyer with it in some way.

Mr. Darlington: I think I have. I have him drawing a *salary* there for *doing little or nothing.*

The Court: The poor old man was broke. He was down and out. He had an Indiana judgment against him of $800,000. He could not pay his life insurance premiums. His wife had saved her estate. She had protected it and put it in this trust. *Now what would you have done* under the same circumstances? They would have to take care of him some way. *I think* it is perfectly clear why they did it.

Mr. Darlington: I think when the evidence is all in it *now* written on there in the *hand of Ferd Meyer* with a

Trial Tr. 815

Court again shows Bias and Sympathy for Defendant Maroon,—shows Resentment of Charges of Fraud against Defendants.

Mr. Darlington: Your Honor, I am in a peculiar position. There are some more questions I want to ask this witness regarding some of the people who came in as officers and stockholders during the period between 1947 and 1953 and who went during that period.

The Court: That would be wholly immaterial. It is wholly immaterial. That is years after Sol Meyer's death, nearly ten years after his death.

Mr. Darlington: They will be asked for the purpose of *supporting the charge* of juggling, concealment and manipulation of the *stock*.

The Court: I know those terms. *I do not appreciate your using those terms.* There is no evidence here to support it. I do not want you going into that any further.

Mr. Darlington: So far as the terms are concerned, the terms manipulation and concealment are used in the *complaint* and *intervening claim*.

The Court: I know, but you put a man on the stand here and accuse him of juggling and being dishonest and making false statements. I do not appreciate that method of handling a case.

Mr. Darlington: I can only say I have not addressed any of those remarks to Mr. Maroon. I have simply answered the Court and stated what the complaint and intervening claim charge. There is nothing personal in it.

The Court: When you ask a witness "Did you sign that affidavit?" and he says "Yes, I did. That is my signature," and you say "*Was that affidavit true* that you signed?", what other construction can you put on it? Your line of examination is wholly improper and *the Court does not appreciate it*.

Go ahead with your case.

Mr. Darlington: Certainly in a case of this type I should be permitted to prove that any testimony or *affidavits* or other statement is *false*. I would not know how to try a *fraud case* otherwise.

Mr. Ward: I object to the statement and move to strike it. This is not a fraud case. He has not shown any semblance of a fraud. His continued statement is an *insult to the Court*.

The Court: Let us get on with the case. (Our italics).

Trial Tr. 859-61

The next 500 pages of Trial Transcript are largely filled with similar prejudicial matters and rulings against the plaintiff, but it seems unnecessary to extend this Appendix by setting them forth, so we pass to the closing day of the trial:

Court's Refusal to Permit Plaintiff to Call Expert Witness to Show Fraudulent Alteration of Stock Certificate.

The Court: What else will you have?

Mr. Darlington: Well, Your Honor, *I had arranged to have here the witness Joseph Nichol* whom I previously mentioned for the purpose of qualifying him briefly as an *expert* upon inks and erasures by chemical means, restoration of them and trying to get the Court's permission for him to *take this original common stock book of Family Loan Company*, Exhibit #2, and see if he can, without leaving the court corridors, *restore the original eradicated signature and date on the endorsement on the 47-share certificate of Rosalyn Meyer*.

The Court: *We will not go into that*. That is immaterial. That would be absolutely immaterial.

Mr. Darlington: I have reason to believe *I could show that instead of it occurring in October 1940* as is now written on there in the *hand of Ferd Meyer* with a

pencil, that the true date was prior to Sol Meyer's death and that instead of the witness being what is now written on there, the signature of Ferd Meyer, *that the witness was Sol Meyer.*

Mr. Ward: It would not make a bit of difference.

The Court: Not a bit. That is *preposterous.* You are *just speculating* on a proposition now. The Court *will not go into that.* It would not make any difference.

Mr. Darlington: I respectfully submit that I have good reason to believe that based upon the other documents in the case—

The Court: It is your supposition. That is all. It is *just suspicion.* There is *no basis for your statement whatsoever.*

Mr. Darlington: May I suggest that if it is baseless it could do the defense no harm to let the true signatures be brought out.

The Court: These experts—*I do not care* to go into that at all. There is *no need to say why,* but if that is all you have *you will not be permitted to do that.*

Trial Tr. 1444-5.

Court's Refusal to Permit Plaintiff to Complete His Direct Examination of Defendant Maroon.

Mr. Darlington: If your Honor please, I am requesting that the witness *Hoke Maroon* return as early as he is obtainable *so that I may complete my examination of him.*

The Court: *You are through today. You are through now.* You have had twelve days here now to examine those two men and three-fourths of your time has been spent in repetitious questions, matters that have been already gone into, *so I am not permitting* you to call Mr. Maroon *and I am not going into this expert witness* about

the *transfer of the share* of stock which would *not make any difference* in this case.

Trial Tr. 1445-6.

Court's Refusal to Permit Plaintiff to Call Two Important Defendants as Witnesses (who had never yet testified).

Mr. Darlington: If Your Honor please, it had also been my intention to attempt *to obtain the attendance here of Rosalyn Meyer and James Meyer.* I did not serve them with subpoenas for today, however, because I estimated incorrectly that they would not be reached today *and I am not through with the plaintiff's case in chief,* if Your Honor please.

The Court: *Well, the Court is.* The Court is through with your case in chief. *I feel that you have been playing with the Court.* You have taken time here that is unnecessary. You have taken time here for twelve days, now on two witnesses. You have examined every paper and if you had just shown some evidence at all of the fundamental allegations of your complaint the Court would feel differently.

Mr. Darlington: As against the twelve days may I respectfully point out that Ferd Meyer and Hoke Maroon were the president and secretary-treasurer of this corporation and they are the principal individual defendants and that the events attempted to be covered in their examination have been over a span from 1920 to 1953 and subsequent to 1953, that the documents such as I have been able to obtain are necessarily somewhat extensive, and that in the light of that and the course which this trial is taking, as indicated by the record, *my examination and entire presentation of the case have been the best I know how to present them.*

Trial Tr. 1446-7.

Note: Contrary to the above aspersion on the good faith and trial conduct of plaintiff-intervenor's counsel, which had often been indulged in by the Judge, and sometimes by some defense counsel during the trial,—we believe the entire record will show that he was uniformly courteous to the Judge and opposing counsel, even in the face of personal abuse,—and that he gave no cause for these aspersions, except to continue trying in good faith to offer his evidence, in the face of great and unjust handicap.

Court Overruled Plaintiff's Oral Motion to Require Defendants to Produce Vital, Basic Stock and Corporate Records.

Mr. Darlington: * * * Your Honor, without waiving my protest against the ruling just made *closing* the plaintiff's case in chief, *I respectfully move* in the alternative that Your Honor do one of the following things alternatively: *First*, and preferably, *require the defendants to produce here for the plaintiff's identification and use in evidence Family Loan Company's stock records* which are *entirely missing* for the *decade 1940 to 1950*, and also *Family Loan Company's debenture records* which, except for offered #8 consisting of the last group of canceled debentures, *is entirely missing*, consisting of the debenture stubs originally issued and successively issued debentures. Also, Family Loan Company's *original ledger* and *journal* showing the original entries, *the receipt of money for its capital stock and other capital which went into it* by way of common stock and preferred stock and otherwise which would furnish evidence, I believe, as to who furnished the capital for Family Loan Company.

The Court: *You* would not believe it if they testified

to it. They have covered that. You spent a day or two on that one subject.

Mr. Darlington: I respectfully urge that I am not bound or precluded by the testimony of Ferd Meyer and Hoke Maroon who were distinctly adverse witnesses and who were called under Rule 43.

I am moving the Court to order the defendants to produce those records I have enumerated, which are *basic* and *essential*, and add to that *the cancelled preferred stock certificates* and the *remainder of the common stock record* beyond Exhibit #2. I say to Your Honor that those are *needed* and I am *entitled* to them on basic grounds in a case of this kind, that without the slightest criticism or inference against any counsel in the case, *the parties themselves have not satisfactorily explained their absence*, and I am asking the Court to order them to produce them, whoever has them, or to account satisfactorily for their absence.

That is my first alternative motion.

The Court: *Your proposition is overruled.* This *occurred in 1930 and 1931.* That is twenty-five years ago, twenty-six years ago.

Your motion is overruled. *The Court will not require them to do that.* They have all stated, every attorney here and everyone else, that they have no knowledge of any other records except those that have been produced.

Mr. Darlington: It is not a question of the attorneys, if Your Honor please, it is a question of the parties.

The testimony of Ferd Meyer and Hoke Maroon indicates very strongly that *all those records existed and were turned over to Seaboard.* Now Seaboard's *local* counsel here *obviously has no direct knowledge.*

The Court: The Court has ruled on that. *The Court is not going to order that done.*

* * *

Mr. Darlington: I do not know how I can make it clearer. *There is not and has not been* during this trial any *slightest inference by me against Attorney Bonsteel* (Seaboard's local counsel) *or any other attorney* in the case. I merely say this, and without questioning his good faith in what he has just said, it is apparent on the face of it that it comes by *hearsay*, by telephone and letters from Seaboard's executives and chief counsel, who would know, and yet *there is not a single affidavit or witness or any explanation from anybody in Seaboard who has actual first-hand knowledge of those facts.* That is my point.

The Court: The Court has ruled on that. What else is it you want?

Trial Tr. 1447-51.

Court Overruled Plaintiff's Motion for Continuance to Enable Him to Obtain the Non-Produced Defendants' Records.

Mr. Darlington: *The second alternative motion*, Your Honor is, the first one having been denied, that Your Honor at this point *continue this trial for a reasonable time to enable the plaintiff to do two things* which without his fault he has not been able to do in this trial, and that includes the intervenor; *first*, to make a *thorough preparation* of his factual matters for trial. I will not reargue that. That was settled by orders of the regular judge of this court before Your Honor sat on the bench as a total stranger to all of us and to the case on the day the trial started, but Your Honor taking cognizance of the prior record I think should grant me that, and also for the purpose of enabling me to attempt to locate by my own means these missing records.

I believe that given an opportunity I can find them and get them produced here. I had no reason to believe that they would not be here until their non-appearance during

the trial, and again, this is *without any inference against counsel*. I am only referring to the *parties*, Family Loan Company, Ferd Meyer, Hoke Maroon and Seaboard itself, and, Your Honor, in the light of those things, I think that Your Honor should grant my present motion to continue this trial for a reasonable time.

The Court: What do you mean by a reasonable time?

Mr. Darlington: I mean, Your Honor, at least thirty days.

The Court: No, no. *There will be no continuation.* We are trying this case now. *I will not be here* thirty days from now.

Mr. Darlington: I know the statute, the United States Judicial Code makes ample provision for that. It provides that when a judge is once assigned to the trial of a case and he takes jurisdiction of the trial—

The Court: There will be no continuation. *Get off that subject.* There will be no continuation. *We are finishing this case right now.*

If you have any further evidence *right now* to offer, all right. If you have *not*, why—

Mr. Darlington: Your Honor, within the confines of Your Honor's rulings and admonitions to me there is nothing that I presently have here to offer. It is *five minutes after four.* (P.M.) I had intended to attempt to secure the attendance of *Rosalyn Meyer* and *James Meyer*, possibly other witnesses tomorrow, as I have indicated, but at the moment there is nothing with which I can go forward.

Trial Tr. pp. 1451-1453.

The Court: I will give you ten minutes and this is the final recess.

We are going to finish this case today.

Trial Tr. p. 1458.

The Judge then announced that he would decide the case the next morning without argument, which he did.

Trial Tr. p. 1462.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958

No. 178

R. E. PECKHAM, Assignee for the Creditors of The Meyer-Kiser Bank, etc.,

Petitioner,

and

R. E. PECKHAM, Trustee,

Petitioner,

vs.

FAMILY LOAN COMPANY, a corporation, et al,

Respondents.

BRIEF OF RESPONDENT, SEABOARD FINANCE COMPANY, IN OPPOSITION TO CERTIORARI

LOUIS S. BONSTEEL
1301 duPont Building,
Miami, Florida
Attorney for Respondent,
Seaboard Finance Company

George A. Chadwick, Jr.
and
Frost & Towers
Southern Building, Washington 5, D. C.
Smathers, Thompson & Dyer
1301 duPont Building, Miami 32, Florida
Of Counsel

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Respondents.

BRIEF OF RESPONDENT, SEABOARD FINANCE COMPANY, IN OPPOSITION TO CERTIORARI

R. E. Peckham, as an assignee for creditors, was the plaintiff in the District Court for the Southern District of Florida, Miami Division, and as a trustee, he was also an intervenor. In his dual capacity Mr. Peckham was the Appellant in the Court of Appeals for the Fifth Circuit and is the Petitioner here. Throughout this brief he will be referred to as plaintiff. Family Loan Company and the various members of the Meyer and Maroon families, who held stock therein, will be referred to as Family, and Seaboard Finance Company, a Delaware corporation, and Seaboard Finance Company, of Florida, co-defendants in the trial court and co-respondents here, will be referred to merely as Seaboard.

For the purpose of convenience the following symbols will be used throughout this brief:

"O.R." for the original printed Transcript of Record filed in the Court of Appeals for the Fifth Circuit on December 11, 1950, in Case No. 13488.

"R" for the printed Transcript of Record filed in the Court of Appeals on August 1, 1957 in Case No. 16817.

"T" for the reporter's transcript of the testimony and proceedings in the trial court.

"PTN" for the Petition for Certiorari.

QUESTIONS INVOLVED

The position taken by the plaintiff's counsel and the matters he has argued have undergone an evolutionary process. In the trial court Family was accused of fraudulent concealment and Seaboard was alleged to be a subsequent fraudulent transferee. In the Court of Appeals plaintiff's counsel argued that, although he established a prima facie case, he was denied a fair trial because the Honorable Emett C. Choate, the resident District Judge, denied him the opportunity to make adequate discovery and preparation for trial and that the trial was, therefore, abortive and incomplete. After judgment for the defendants was affirmed the plaintiff's counsel in a petition for rehearing argued that the bias and prejudice of the Honorable Edgar S. Vaught, the trial judge, deprived him of a fair trial.

The present attitude of the plaintiff seems to be that the Court of Appeals glossed over the asserted errors of the trial court and failed in its duty by not passing upon the

question of a fair trial, and in the alternative, that if this question were decided, the decision was erroneous. The questions presented, therefore, can be succinctly stated as follows:

I

DID THE DISTRICT COURT DENY THE PLAINTIFF A FAIR TRIAL?

II

DID THE COURT OF APPEALS PROPERLY PASS UPON THE FIRST QUESTION?

STATEMENT OF THE CASE

Not only is the history of this case a long and involved one, but it grew out of facts and circumstances going back almost thirty years.

Family was incorporated in March, 1930 (R 24, T 145).

On May 12, 1931, the Meyer-Kiser Bank of Indianapolis failed (O.R. 2) and on the same day the Meyer-Kiser Bank of Miami closed its doors (O.R. 274).

On September 20, 1932 the liquidator of the Meyer-Kiser Bank of Miami recovered a judgment against Ferd S. Meyer, growing out of his statutory liability as a stockholder (O.R. 273). Thereafter on March 13, 1934 Ferd S. Meyer was discharged in bankruptcy (O.R. 286).

On October 18, 1938 the receiver of the Meyer-Kiser Bank of Indianapolis recovered a judgment against Sol Meyer in Indiana (O.R. 8), which was reduced to judgment

in the United States District Court for the Southern District of Florida on January 30, 1939 (O.R. 12).

Sol Meyer died in November, 1939 (O.R. 189, R 91) and the following year the plaintiff's predecessor instituted a suit against Ferd S. Meyer in the Circuit Court for Dade County, Florida to set aside a conveyance of a parcel of real estate made by Sol Meyer, as trustee, in 1936 (O.R. 102-112). The decree in that case was in favor of the defendant (O.R. 241).

The judgment against Sol Meyer was assigned to the Plaintiff on March 24, 1944 (O.R. 16), and the judgment against Ferd S. Meyer was assigned to the Plaintiff on February 14, 1947 (O.R. 277).

In view of the extremely critical remarks made by the Plaintiff in his brief in the Court of Appeals, in his Petition for Rehearing and in his Petition for a Writ of Certiorari in this court, it may be helpful to have, in skeletal form, a chronological table of the highlights of the litigation.

March 1, 1949 suit in the nature of a creditor's bill against Family was instituted (O.R. 1).

September 15, 1950 the Plaintiff filed his Motion for Discovery and Inspection of Documents (O.R. 293).

October 25, 1954 a Supplemental Complaint was filed making Seaboard a party as an alleged fraudulent transferee of assets of Family (R. 12).

November 19, 1954 Family and Seaboard filed their Answers and the case was at issue (R 30, 34).

November 7, 1956 a Notice of the setting of the cause for trial on February 25, 1957 was issued (Page 1-a of the Appendix to the Plaintiff's Brief in the Court of Appeals).

January 10, 1957 an Order for a pre-trial conference to be held January 25, 1957 was issued (R 69).

January 31, 1957 a postponed pre-trial conference was held with District Judge Emett C. Choate presiding (R 80).

February 21, 1957 Plaintiff filed his Motion for Continuance and argued it the same day before District Judge Choate (R 120).

February 25, 1957 trial commenced before Honorable Edgar S. Vaught, District Judge Pro Hac Vice (T 1).

March 13, 1957 trial was concluded (T 1479).

March 19, 1957 judgment was entered for the defendants (R. 172).

May 3, 1957 Plaintiff filed his Notice of Appeal (R. 183).

Subsequently and after obtaining many extensions of time to lodge the record and to file briefs and after the appeal had once been dismissed for want of prosecution and later reinstated, plaintiff finally served briefs on or about August 12, 1958. The opinion of the Court of Appeals affirming the judgment of the trial court was rendered on January 20, 1959 (PTN A 13).

THE ISSUES

Although the Plaintiff has repeatedly argued that the merits of the case were not involved in the court below and are not now before this court, nevertheless, in order to evaluate properly the Plaintiff's contentions, this court should not lose sight of the fact that the issues tried in the District Court were very simple and can be summarized as follows: 1. Did Sol Meyer invest directly in Family or indirectly through a trust created by his wife, Florence S. Meyer? 2. Did Ferd Meyer invest in Family either directly or indirectly prior to his discharge in bankruptcy, which occurred March 13, 1934? 3. Was there any fraud in the procurement of Ferd Meyer's discharge in bankruptcy?

There was no material issue insofar as Seaboard was concerned. Plaintiff alleged fraud in the issuance of stock and debentures of Family not only on the part of Sol Meyer and his son, Ferd, but also on the part of the other individual defendants and sought to subject the assets of Family to the payment of the judgments which had been assigned to him. The amendments joining Seaboard were based upon the fact that in 1953 all the outstanding stock of Family was exchanged for sixty thousand shares of the stock of Seaboard. It was alleged, in effect, that Seaboard knew that Sol Meyer and his son, Ferd, were the equitable owners of Family stock, that they controlled and manipulated its affairs, and that the stock and debentures were actually issued to the individual defendants in order to conceal assets, and that Seaboard was, therefore, a fraudulent transferee. No monetary relief was sought against Seaboard and at no time did the plaintiff seek to enjoin the individual defendants from transferring or disposing of their shares in Family

nor the shares in Seaboard which they received in exchange for the Family stock.

If the Plaintiff had prevailed in the trial court, he would have been entitled to subject the Seaboard stock held by the individual defendants to his judgment. In view of the failure to seek an injunction, notwithstanding the many allegations of fraud, and in view of Seaboard's assertions in its answer that it had no knowledge of any fraud, but on the contrary, dealt in good faith, at arm's length, and for valuable consideration, it is important to note that at the time of the exchange, the assets of Family and the sixty thousand shares of Seaboard stock were valued at $1,269,000 (Plaintiff's Exhibit 4). These shares were subsequently split two for one (T 1331), and since they are sold on both the Los Angeles and New York Exchanges, their value from day to day can be readily determined. At the time this case was decided by the Court of Appeals their value was in excess of $2,200,000 and as this brief is written, they are worth in excess of $2,800,000.

ARGUMENT

I

DID THE DISTRICT COURT DENY THE PLAINTIFF A FAIR TRIAL?

Plaintiff admits on Page 10 of his Petition that Judge Vaught was a stranger to him. He may have intended to imply that he was not a stranger to other counsel in the case. He knew, however, that Judge Vaught was a retired District Judge from Oklahoma (see Appendix B, Page 2-a, to the Plaintiff's Brief in the Court of Appeals), and during

the trial the Judge stated that he had never heard of this case or of the parties thereto until the trial started (T 211). Notwithstanding these facts, the plaintiff asserts that the judge was "saturated with prejudice" (PTN 9), which existed "throughout the trial" (PTN 7), that the bias and prejudice was "strong" (PTN 3), that the judge's conduct constituted a "flagrant and unprecedented assumption of the role of defense counsel" (PTN 18), that he interrupted the Plaintiff's questions and asked "improper and leading" questions of his own (PTN 19), that he "expressed his resentment at plaintiff's questions" and "indulged in sarcasm and derogatory statements toward plaintiff's counsel" (PTN 20), and that the trial judge "arbitrarily cut off" the case (PTN 21).

The language of the Petition is not as vitriolic as that employed by plaintiff's counsel in the Court of Appeals. Prior to the decision affirming the judgment of the trial court and the Petition for Rehearing, the Plaintiff vented his spleen more toward the resident district judge than the trial judge. On page 35 of the Appellant's Brief the plaintiff was, in all probability, criticising the Federal Rules of Civil Procedure; when he referred to "the new, subversive 'rush it through' technique", resulting in a "dangerous dogma fostered during the last twenty years by left-wingers and subversives . . . secretly designed primarily as a means for rushing and forcing left-wing social litigation through the federal courts". The plaintiff was, however, generous enough to characterize the defendants as "non-subversive".

The plaintiff has failed to advise this court that at the time of trial this was the oldest case on the docket of the court (R 108, 131), that his counsel did not bring on for

hearing his Motion for Discovery and Inspection of Documents from the time it was filed in December, 1950 until the pre-trial conference on January 31, 1957. He has also failed to advise this court that although he stated at the pre-trial conference that he would not seek a continuance (R 106), nevertheless on February 21, 1957, having known since approximately November 7, 1956 that the case was set for trial to commence February 25, 1957, he made a motion for a continuance (R 112) principally on the ground that he had not had an opportunity to examine books and records in the possession of the defendants. During the argument of that motion he failed to advise the court that on May 14, 1955 his co-counsel in Miami, Florida, wrote a letter to Seaboard's counsel stating, among other things, "We do not at this time seek to examine any records of the Family Loan **relating to the issues** in the case, such as records relating to the **ownership of Family Loan's capital stock** or records pertaining to the purchase or other dealings between Seaboard and Family Loan" (emphasis supplied) (R. 128). The plaintiff also failed to advise the trial court that his co-counsel was notified by the writer of this brief on February 18, 1957 that the records required to be produced by the court's order of January 31st had been received from Los Angeles and the same co-counsel advised this writer "that he was not interested in seeing or inspecting any of those books and documents until Mr. Darlington asked him to do so" (R 128).

The dilatory tactics of plaintiff's counsel are well illustrated by his conduct at the pre-trial conference. Although the order directed counsel to be "vested with full authority to make disclosures of fact and to admit and stipulate as to undisputed facts" (R 69-70), it became quite apparent that

plaintiff's counsel had made no attempt to do any of the things customarily expected and had not even taken the trouble to compare copies of documents attached to pleadings with the originals. He advised the court that he was "going to try" to agree with opposing counsel on the facts "as expeditiously as possible", and that he would in the future examine documents and would in the future "get together" with opposing counsel. This prompted the court to remark "Apparently you are not ready for pre-trial . . . you are just wasting the Court's time" (R 91-95).

Notwithstanding the fact that this case had been pending almost eight years, that it had been at issue for more than two years, and that it had been noticed for trial for nearly four months, the plaintiff admittedly had not prepared for trial. In fact, the first point in his brief in the Court of Appeals was to the effect that the court deprived him of the opportunity to make discovery and preparation, and throughout his argument on that point the brief is replete with expressions that he was "suddenly and unexpectedly" "pressured", "rushed", and "forced" into a "premature" and "abortive" trial.

Plaintiff's counsel has taken advantage of the burdensome amount of work imposed upon this court and undoubtedly assumes that this court does not have time to sift through the 1480 page Transcript of the trial proceedings. In fact, he seeks to prevent any inquiry into the facts by stating that he 'does not ask this court to review the merits of the evidence", and that issues relating to Seaboard are not here "for review" (PTN 2, 6). The Transcript of the proceedings clearly reveals, however, that twelve days were devoted to a "fishing expedition". The plaintiff did not even

attend the trial. He produced no witnesses nor documents of his own. Plaintiff's counsel called two of the individual defendants alternately and cross-examined them at great length and repetitiously about documents produced by the defendants. On the 12th day when the court announced that the case would be closed, plaintiff's counsel then sought a continuance for thirty days to take a deposition and to call witnesses who had not been subpoenaed (T. 1446, 1452, 1453, 1467). He also sought a continuance for the purpose of requiring the defendants to produce additional documents. After both general counsel and trial counsel for Seaboard advised the court that according to the president and the secretary-treasurer of that company, all available documents had been produced, plaintiff's counsel replied that these representations were patently based on hearsay (R.1450-1451). Early in the trial announcement was made to the Court that the president of Seaboard was in attendance so that the plaintiff's counsel could examine him and a request was made that such examination be concluded by a certain day in order to permit him to return to Los Angeles. Plaintiff's counsel indicated agreement but did not call the president (R. 331-336).

It is quite apparent, therefore, that plaintiff's counsel was trifling with the Court.

The burden of plaintiff's argument is that the questioning of witnesses by the Court, the exclusion of oft-repeated testimony and of immaterial and irrelevant matters, and comments that plaintiff's counsel was not eliciting any facts in support of the issues manifest prejudice and bias. Apparently counsel is not willing to admit that he had no case when he started and did not develop one as he proceeded.

As a result of protracted and repetitious cross-examination, the plaintiff established that Family was organized by Florence S. Meyer, the mother of the defendant, Ferd Meyer, in 1930, and that until 1940 its modest amount of capital was furnished solely from Florence Meyer's funds (T 116, 494, 532, 538, 612, 806, 838). Plaintiff further established that Sol Meyer never directly or indirectly invested any money in Family (T 217, 493-494, 545-546, 836, 896, 997, 1003, 1007, 1073). Ferd Meyer did not invest in Family until 1940, after the death of his father, Sol, (T 126, 130-131, 217, 493-494, 1003-1004) and when he did acquire an interest in Family's capital stock, none of the funds invested by him had been obtained either directly or indirectly from his father (T 836, 1227, 1228, 1262). It was also established that Hoke T. Maroon did not invest in Family or acquire any of its stock until 1940 (T 126, 130, 247, 337), and that when he did, none of the funds which he used came directly or indirectly from Sol Meyer (T 495).

That the plaintiff's purported cause of action was based solely on suspicion and not on any facts is all too apparent from an examination of the record.

The charges leveled at both the District Court and the Court of Appeals are on a par with the plaintiff's allegation in the sixth paragraph of his Intervening Claim that neither he nor his predecessor discovered "the facts constituting the aforesaid fraud" until within three years prior to filing of the said Intervening Claim (O.R. 271-272).

In the unsuccessful suit instituted in 1940 to set aside an alleged fraudulent conveyance, referred to hereinabove, Ferd Meyer was interrogated concerning any stock owned by him or other members of his family in Family Loan Company and as to whether or not any such stock was owned;

paid for, or obtained directly or indirectly from Sol Meyer. The fact of the matter is that the plaintiff has never discovered any fraud in the organization of Family or the ownership of its stock or other assets, for there was none, and the absence thereof was clearly established. The conclusion is inescapable that then, as well as now, Plaintiff's complaint was based upon speculation, conjecture, and suspicion.

The penchant of plaintiff's counsel for indulging in innuendo rather than producing facts is probably nowhere better illustrated than on the sixth page of his Petition, wherein he states that "these supplemental issues relating to Seaboard and the S.E.C. and stock exchanges", while not before the court for review, "needed to be mentioned" as showing their broad and serious character. The Supplemental Complaint and Supplemental Intervening Claim (R 12, 14) which are the only pleadings directed by the plaintiff to Seaboard contain no mention of the Securities and Exchange Commission or the stock exchanges. Seaboard's answer, however, (R 34) filed in 1954 has attached thereto a copy of the contract for the exchange of Family and Seaboard stock in which Seaboard agreed that the sixty thousand shares involved "shall be authorized for listing on the New York and Los Angeles stock exchanges prior to delivery" (R 47), a list of the subsidiaries of Family together with names and locations of all loan offices, the audit report by Ring, Mahony & Arner of Family and its subsidiaries including copies of the Comparative Consolidated Balance Sheets, Profit and Loss Statements, a list of le ses held by Family, and an Escrow Agreement. Plaintiff's counsel was, therefore, in possession of all information concerning the transaction for almost two years before the case was noticed for trial. During the trial the plaintiff introduced in evidence,

as his exhibit 4, a Securities and Exchange Commission Form 8-A and a stock exchange form A-14695 produced by Seaboard. The exhibit referred to the contract hereinabove mentioned and particularly the portion thereof in which the shareholders of Family stated that they were acquiring the Seaboard stock for investment, not resale, and contained an opinion by Seaboard's counsel that registration under the Securities Act of 1933 was not required. There is no issue on this point although plaintiff's counsel in his brief in the Court of Appeals argued that both the Securities and Exchange Commission and the stock exchanges were deceived.

If the trial judge looked with disfavor upon the wholly unsupported constant charges of fraud made by plaintiff's counsel, this is understandable, but does not constitute bias or prejudice amounting to a denial of a fair trial.

We have no quarrel with the holdings of the cases cited in the Petition. We assert, however, that any attempt to apply them to the instant proceeding constitutes a direct, flagrant attack upon the integrity of Judge Vaught.

In **Knapp v. Kinsey** (6 Cir. 1956) 232 F. 2d 458, 466, cited by the plaintiff in his Petition, the court said:

> "The bias or prejudice which will disqualify a judge must be 'personal' bias or prejudice as distinguished from a judicial one. . . . Nor is it sufficient that the alleged bias or prejudice arises from the judge's view of the law, which may have been expressed by him in some prior case. . . . Adverse rulings during the course of the proceedings are not by themselves sufficient to establish bias and prejudice."

In **Montrose Contracting Co. v. Westchester County,** (2 Cir. 1938) 94 F. 2d 580, 583, quoted in the Knapp case supra, the court said:

". . . It has often been repeated that a trial judge in the federal courts is more than a mere arbitrator to rule upon objections as to evidence and to instruct the jury as to the law. He may and should take an active part in the examination of witnesses if he considers that the course of justice requires it: it is his function to elicit all the material evidence and assist in making straight the path of justice. Particularly was this true when it appeared to the learned judge below, engaged in a very long trial, that there was an insufficient or improper elucidation of the provable facts.

* * *

. . . It is unnecessary for us to consider the various individual witnesses interrogated by the court, for it is sufficient merely to say that the court was well within its province in attempting to ascertain the truth and is not subject to the criticism now advanced. It became necessary several times to require counsel to return to the issues on trial and the court did so with a wise exercise of discretion. These assignments of error are without merit."

In **Fidelity & Deposit Co. of Maryland v. Bates** (8 Cir. 1935) 76 F. 2d 160, 170 the Court said:

"The trial judge in a federal court is not a mere presiding officer. It is his function to conduct the trial in an orderly way with a view to eliciting the

truth, and to attaining justice between the parties. It is his duty to see that the issues are not obscured, that the trial is conducted in a proper manner, and that the testimony is not misunderstood by the jury, to check counsel in any effort to obtain an undue advantage or to distort the evidence, and to curtail an unnecessarily long and tedious or iterative examination or cross-examination of witnesses. He has the authority to interrogate witnesses, and to express his opinion upon the weight of the evidence and the credibility of the witnesses. Kettenback et al, v. United States (C. C. A. 9) 202 F. 377, 385."

II

DID THE COURT OF APPEALS PROPERLY PASS UPON THE FIRST QUESTION?

The argument that the Court of Appeals failed to discharge its duty to decide that the alleged bias and prejudice of the District Judge prevented the plaintiff from having a fair trial is best answered by the opinion of our Court of Appeals for the Fifth Circuit, which is included in the Appendix to the Petition (A 13-17). Not only did that court acknowledge that the plaintiff placed "the greatest stress" on the contention that he was denied a fair and adequate trial, but four of the five pages of the opinion are devoted to a discussion of the court's discretionary powers and his duty to "keep a case moving within the bounds of reason", the matter of denying continuances, and declining to hear arguments at the close of the trial in non-jury cases, and the right of the court to admonish counsel.

The record of the protracted trial for which plaintiff's counsel inexcusably failed to prepare clearly shows that the trial judge's adverse rulings were not only free of bias and prejudice but were wisely employed to curtail a long and tedious "fishing expedition" and to confine the testimony to the issues; that the court's interrogation of witnesses was required to ascertain the truth and make straight the path of justice; that his comments upon the weight of the evidence were both permissible and justified and any admonition was to prevent distortion of the facts.

CONCLUSION

For the reasons shown hereinabove the Petition for Writ of Certiorari should be denied and this long drawn out litigation concerning events extending over a period of almost thirty years should be terminated.

Respectfully submitted,

Louis S. Bonsteel
1301 duPont Building
Miami, Florida.
Attorney for Respondent,
Seaboard Finance Company.

George A. Chadwick, Jr.
and
Frost & Towers
Southern Building, Washington 5, D. C.

Smathers, Thompson & Dyer
1301 duPont Building, Miami, Florida
Of Counsel

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this the _____ day of August, 1959 I mailed a copy of the foregoing Brief to Leo S. Julian, Biscayne Building, Miami, Florida and to Jay E. Darlington, 306 Hammond Building, Hammond, Indiana, Attorneys for Petitioners, and to William G. Ward, duPont Building, Miami, Florida, and to Garland M. Budd, Olympia Building, Miami, Florida, Attorneys for Respondents, Original Defendants.

Louis S. Bonsteel
Attorney for Respondent,
Seaboard Finance Company.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958.

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JAMES R. BROWNING, Clerk

No. 178.

R. E. PECKHAM, Assignee for the Creditors of The Meyer-Kiser Bank, succeeding Thomas E. Garvin, Receiver of The Meyer-Kiser Bank,

and

R. E. PECKHAM, Trustee,

Petitioners,

vs.

FAMILY LOAN COMPANY, a corporation;
FERD S. MEYER, otherwise known as Ferdinand S. Meyer;
FERDINAND S. MEYER, Trustee, otherwise known as Ferd S. Meyer, Trustee;
ROSALYN A. MEYER, otherwise known as R. A. Meyer;
JAMES MEYER;
JAMES MEYER, Trustee;
HOKE T. MAROON, otherwise known as H. T. Maroon;
H. T. MAROON, Trustee, otherwise known as Hoke T. Maroon, Trustee;
SEABOARD FINANCE COMPANY OF FLORIDA, a corporation;
SEABOARD FINANCE COMPANY, a Delaware corporation;
TOWN FINANCE COMPANY, INC., a corporation,

Respondents.

BRIEF OF RESPONDENTS, FAMILY LOAN COMPANY, FERD S. MEYER, FERDINAND S. MEYER, Trustee, ROSALYN A. MEYER, JAMES MEYER, JAMES MEYER, Trustee, HOKE T. MAROON, H. T. MAROON, Trustee, TOWN FINANCE COMPANY, INC., a Corporation, IN OPPOSITION TO GRANTING OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

WILLIAM GRESHAM WARD,
1240 Alfred I. duPont Building,
Miami 32, Florida, and
GARLAND M. BUDD,
Olympia Building,
Miami, Florida,
Attorneys for Respondents.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958.

No. 178.

R. E. PECKHAM, Assignee for the Creditors of The Meyer-Kiser Bank, succeeding Thomas E. Garvin, Receiver of The Meyer-Kiser Bank,

and

R. E. PECKHAM, Trustee,

Petitioners,

vs.

FAMILY LOAN COMPANY, a corporation;
FERD S. MEYER, otherwise known as Ferdinand S. Meyer;
FERDINAND S. MEYER, Trustee, otherwise known as Ferd S. Meyer, Trustee;
ROSALYN A. MEYER, otherwise known as R. A. Meyer;
JAMES MEYER;
JAMES MEYER, Trustee;
HOKE T. MAROON, otherwise known as H. T. Maroon;
H. T. MAROON, Trustee, otherwise known as Hoke T. Maroon, Trustee;
SEABOARD FINANCE COMPANY OF FLORIDA, a corporation;
SEABOARD FINANCE COMPANY, a Delaware corporation;
TOWN FINANCE COMPANY, INC., a corporation,

Respondents.

BRIEF OF RESPONDENTS, FAMILY LOAN COMPANY, FERD S. MEYER, FERDINAND S. MEYER, Trustee, ROSALYN A. MEYER, JAMES MEYER, JAMES MEYER, Trustee, HOKE T. MAROON, H. T. MAROON, Trustee, TOWN FINANCE COMPANY, INC., a Corporation, IN OPPOSITION TO GRANTING OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

The Respondents were the successful Defendants in the trial court and the successful Appellees in the United

States Court of Appeals for the Fifth Circuit, *Peckham v. Family Loan Company et al.*, 262 F. 2d 422.

In this brief the parties will be referred to as they stood in the trial court, and the following symbols will be used:

RV, Record printed in Appellate case 13,488;
RV1, Record Volume 1, for the printed record in Appellate Cause No. 14,410;
RV2, Record Volume 2, for the printed record in Appellate Cause No. 16,871, the decision in which the Petitioners seek to have reviewed;
Tr., for the mimeographed transcript of testimony and proceedings in the trial court;
PlX for Plaintiffs' exhibits;
PtA for Petitioners' appendix;
Res A for Respondents' appendix;
Pet. for Petition for Certiorari.

QUESTION PRESENTED.

Alleged Basis for Review:

The Petitioners contend, basically, that the trial judge, Honorable Edgar S. Vaught, District Judge, was biased and prejudiced against the Plaintiff and Intervenor throughout the trial and that

"that bias and prejudice of the trial judge *throughout the trial* rendered the trial abortive and unjust and requires a new trial," (Pet. 7), and that the Court of Appeals' opinion so far sanctioned the alleged bias and prejudice as to call for the exercise of this court's power of supervision.

The limited basis of the Petition is again stated:

> "While the factual and legal merits of the case are *not* here for review *as such*, it is proper for this court to *briefly* notice the Trial Transcription, which has been certified up, sufficiently to see that from the *beginning* to the end the trial was saturated with *prejudice* of the trial judge against this Petitioner-Plaintiff and *sympathy* in favor of these Respondents-Defendants, sufficient to make the trial abortive." (Pet. 9).

The Plaintiff and the Intervenor expressly state, in their petition, that they do not ask this court to review the merits of the evidence, findings of fact, or conclusions of law of the District Court (Pet. 2).

STATEMENT OF THE CASE.

While the Plaintiff and the Intervenor complain only of the alleged prejudice of the trial judge, we believe that a synopsis of the pleadings and the history of the case preceding the trial is material to the consideration of the question presented and present the following for the information and assistance of the court:

The Plaintiff brought a Creditor's Bill based on a judgment against Sol Meyer, and the Intervenor presented a claim in the nature of a Creditor's Bill based on a judgment against Ferd S. Meyer (son of Sol Meyer).

The Judgment Against Sol Meyer:

The Plaintiff's predecessor, Thomas E. Garvin, Receiver of the Meyer-Kiser Bank at Indianapolis commenced an action, in the state courts of Indiana, against Sol Meyer on November 16, 1933, alleging a misapplication of the funds of the bank and obtained a judgment against

Sol Meyer on October 18, 1938, which after remittitur, amounted to over eight hundred thousand dollars and thereafter, upon the basis of that state judgment, commenced a suit in the United States District Court for the Southern District of Florida against Sol Meyer and recovered a personal judgment against him on January 30, 1939. Sol Meyer died on November 18, 1939, leaving no assets.

The Complaint:

On March 1, 1949, Plaintiff as trustee for the creditors of the Indianapolis bank filed this suit. The amended Complaint, as against these Defendants, is a Creditors' Bill seeking to reach certain personal property identified as the stock, debenture, and evidences of indebtedness of Family Loan Company. Plaintiff's theory is that Thomas E. Garvin, Receiver of the Meyer-Kiser Bank of Indianapolis, obtained a judgment against Sol Meyer and that while Sol Meyer was indebted upon the matters resulting in the judgment, he furnished the capital for and organized Family Loan Company and lent or furnished additional money or property actually belonging to him to said corporation and caused the stock, debentures, or other evidences of indebtedness of said company to be issued or transferred to the individual and Trustee Defendants who paid nothing therefor but held the same for and in behalf of Sol Meyer and that these conveyances were voluntary conveyances by Sol Meyer and that he and the individual and Trustee Defendants engaged in those transfers for the purpose of defrauding the said judgment creditor and that said judgment had been assigned to the Plaintiff. He alleges that neither the Plaintiff nor his assignee discovered, learned, or had knowledge of the facts constituting the alleged fraud until during a period of less than three years immediately prior to the filing of the action.

The supplemental Complaint alleged that the individual Trustee Defendants and other non-Defendants owning stock in Family Loan Company sold all of the outstanding stock in that company to Seaboard Finance Company in April, 1953, during the pendency of the second appeal.

The Judgment Against Ferd Meyer:

On September 20, 1932, the liquidator of Meyer-Kiser Bank of Miami obtained a judgment against Ferd S. Meyer (son of Sol Meyer) upon a stockholders assessment, and on September 18, 1933, Ferd Meyer filed proceedings in voluntary bankruptcy scheduling that judgment as one of his liabilities (RV1, pp. 234, 345). He was adjudged bankrupt on September 18, 1933, and discharged in bankruptcy on March 13, 1934 (RV1, pp. 364, 393). The liquidator of Meyer-Kiser Bank of Miami held a public sale of the remaining assets of the bank and on March 22, 1938, sold a group of assets and claims, including the judgment against Ferd Meyer, to Augusta Holding Corporation (RV1, p. 276). That company had investigated Ferd Meyer and the bankruptcy and regarded the judgment as worthless and in making its offer for the purchase of the assets, had assigned no value to the judgment (PlX 82-b, Tr. pp. 1438-1440).

The Assignment to Peckham:

In early February of 1947 Mr. Peckham, through an agent, approached the Director-Trustees of Augusta Holding Corporation, a dissolved Florida corporation, and proposed that they assign the judgment to him in trust under an agreement whereby he as assignee for the creditors for Meyer-Kiser Bank at Indianapolis would pay all expenses of litigation and would furnish counsel and would commence litigation against Ferd Meyer seeking to enforce

the judgment, and if any sums were recovered, either under the judgment against Ferd Meyer or under the judgment held by him against Sol Meyer, the proceeds would be divided *pro rata* according to a ratio agreed upon (Tr. pp. 1440-1441, PlX 82b). The Trustees of the Augusta Holding Corporation agreed to the proposition, and on the 14th of February, 1947, a trust agreement contract setting forth the foregoing was entered into (Tr. pp. 1438; PlX 82a).

Theory of Intervenor:

That Ferd S. Meyer became indebted to the Meyer-Kiser Bank of Miami on May 12, 1931, the day the bank closed, by reason of the stockholders' double assessment liability, by reason of which the judgment against Ferd S. Meyer was obtained which remains wholly unsatisfied. Intervenor alleged that while Ferd S. Meyer was liable to the bank on the obligation for which the judgment was recovered, made transfers, manipulations, and concealments of his assets with intent to cheat, hinder, delay and defraud his judgment creditor. That while Ferd S. Meyer was the owner or purported owner of a substantial part of the stock, notes, debentures, or other evidences of indebtedness of Family Loan Company, he caused or knowingly permitted the same to be issued or transferred to the names of the individual and Trustee Defendants and that he and the other Defendants have continued to manipulate and conceal the assets of the said Ferd S. Meyer and prevent them from being applied to the satisfaction of the judgment. The Intervenor alleged that he was the owner of the judgment because of the assignment to him as trustee.

In the supplemental intervening claim the Intervenor alleges that the individual and Trustee Defendants and

other non-Defendants owning stock in Family Loan Company sold all of the outstanding stock in that company to Seaboard Finance Company in April, 1953, during the pendency of the second appeal, which was an appeal taken by the Intervenor.

Defendants' Defenses to Complaint:

Each of the Defendants replied that Sol Meyer did not organize Family Loan Company and that no money or assets of Sol Meyer caused or procured any stock, debentures or evidences of indebtedness of the company to be issued. Defendants deny entering into any conspiracy with Sol Meyer to conceal any of his assets and denied that they held or ever held any assets which equitably belonged to Sol Meyer. They further answered that the stock and debentures of Family Loan Company held by them were their individual property and that their title was not traceable in any manner to Sol Meyer or to any person acting for or on his behalf. The Defendants admitted that they had sold their stock in Family Loan Company to Seaboard Finance Company but contend that the stock belonged to them and they had every right to deal with their own property as they saw fit.

Defendants' Defenses to Intervenor's Claim:

Each of the Defendants replied that Ferd S. Meyer had filed voluntary bankruptcy proceedings and had listed the judgment as one of his liabilities and that Ferd S. Meyer had been discharged in bankruptcy and that no money or assets of Ferd S. Meyer had gone into Family Loan Company prior to his discharge in bankruptcy and that at no time prior to the bankruptcy did any of the Defendants hold any money or assets in behalf of Ferd S. Meyer. The Defendant Ferd S. Meyer replied that he had

filed bankruptcy proceedings listing all of his assets and liabilities, among such liabilities listed being the judgment in question and that he had been discharged in bankruptcy and that said discharge discharged his liability on the said judgment. He further replied that he concealed none of his assets in the bankruptcy proceedings and that no money or other assets of his had gone into the Family Loan Company prior to his bankruptcy and that no person, prior to his discharge in bankruptcy had held any stock or debentures or other evidence of indebtedness of said company for and in his behalf. Each of the Defendants further replied that their holdings in said company were their own property and that they were not in any way responsible for the judgment held by the Intervenor. The Defendants also replied that the Intervenor's claim was champertous because the basis of the Intervenor's claim was the champertous Trust Agreement under which he claimed the right to maintain the action in intervention.

Historical Status of Case:

The trial judge was faced with certain undisputed facts of record which we bring to the attention of this court in chronological order as follows:

1. *Family Loan Co.*, charter issued March, 1930 (Tr. p. 145, PlX1).

2. Meyer-Kiser bank of Indianapolis, closed May 12, 1931 (RV1, p. 2).

3. Meyer-Kiser Bank of Miami, closed May 12, 1931 (RV1, p. 274).

4. Judgment against Ferd S. Meyer, upon stockholders' assessment, recovered by Liquidator of Meyer-Kiser Bank of Miami on September 20, 1932 (RV1, pp. 273-274).

5. *Florence S. Meyer Trust created on January 16, 1932*, recorded in Marion County, Indiana, November 28, 1932 (RV1, pp. 222-234).

6. Ferd S. Meyer filed Bankruptcy on September 18, 1933 (RV1, p. 234).

7. Liquidator's judgment against Ferd S. Meyer listed in Bankruptcy Schedule (RV1, p. 345).

8. Ferd S. Meyer adjudged bankrupt September 18, 1933 (RV1, p. 364).

9. Ferd S. Meyer discharged as bankrupt March 13, 1934 (RV1, p. 393).

10. Sale and assignment of judgment against Ferd S. Meyer by Liquidator of Meyer-Kiser Bank of Miami by Augusta Holding Corporation, March 22, 1938 (RV1, p. 276).

11. Judgment against Sol Meyer recovered by Thomas E. Garvin, Receiver of the Meyer-Kiser Bank of Indianapolis, in District Court of the United States, Southern District of Florida, Miami Division, on January 30, 1959 (RV1, pp. 11-12).

12. *Sol Meyer died November 18, 1939* (stipulated date) (RV2, p. 91).

13. Thomas E. Garvin, Receiver of the Meyer-Kiser Bank of Indianapolis, filed Chancery Cause No. 63001 against Ferd S. Meyer as Trustee for Edward Meyer, Sol Meyer, Jr., and James M. Meyer and Ferd S. Meyer, individually, in the Circuit Court of the 11th Judicial Circuit of Florida in May, 1940. Final Decree dismissing the cause with prejudice entered September 25, 1943 (RV1, pp. 102-243).

14. Assignment of judgment against Sol Meyer by Thomas E. Garvin, Receiver of Meyer-Kiser Bank to Plaintiff on March 21, 1944 (RV1, pp. 16-17).

15. Assignment of judgment against Ferd S. Meyer by Trustees of Augusta Holding Corporation, a dissolved corporation, to Intervenor on February 14, 1947 (RV1, pp. 277-279).

16. Trust Agreement between Trustees of Augusta Holding Corporation, a dissolved Florida corporation, and Intervenor, dated February, 1947, providing that Intervenor furnish costs and counsel for litigation and divided proceeds (PlX 82-a and 82-b, TTl, pp. 438-1441).

17. *Plaintiff commenced this suit March 1, 1949* (RV1, p. 1).

18. Defendants filed answers May 9, 1949 (RV1, pp. 70-258).

19. Plaintiff filed Motion for leave to examine books and records *September 15, 1950* (RV1, p. 82).

20. Order dismissing Plaintiff's suit entered November 22, 1950 (RV1, pp. 298-301).

21. Plaintiff appealed and the Order of Dismissal was reversed (Appellate Cause No. 13,488), reversing Mandate filed August 14, 1952.

22. Intervenor's Motion for leave to intervene heard November 29, 1952. Final order denying Petition to Intervene entered December 16, 1952.

23. Intervenor appealed (Appellate Cause No. 14,410) and Mandate reversing order denying Petition to Intervene filed June 7, 1954 (RV2, p. 2).

24. Order setting aside former order and permitting intervention entered October 25, 1954 (RV2, p. 19).

25. Supplemental complaint filed October 25, 1954 (RV2, p. 12).

26. Supplemental intervening claim filed October 25, 1954 (RV2, p. 14).

27. Answer to intervening claim and supplemental intervening claim filed *November 16, 1954* (RV2, p. 20).

28. Answer to supplemental amended complaint filed *November 19, 1954* (RV2, p. 34).

29. Answer to amended complaint and supplement thereto and intervening claim and supplement thereto filed November 19, 1954 (RV2, p. 34).

30. Notice of Trial filed November 7, 1956, setting case for trial on February 25, 1957 (Appendix A, Appellants' Brief).

31. Order setting Pretrial Conference filed January 10, 1954 (RV2, p. 69).

32. Pretrial Conference, January 31, 1957, with Transcript of Proceedings (RV2, p. 81).

33. Plaintiff's Motion for Continuance filed February 21, 1957 (RV2, p. 112).

34. Order denying Motion for Continuance dated February 21, 1957 (RV2 p. 135).

35. Trial before Honorable Edgar S. Vaught, Judge, *opening day* February 25, 1957 (TT, Cover Volume 1).

36. Trial ends at 5 p.m. March 12, 1957 (TT1, p. 462).

37. Trial decision March 13, 1957 (TT1, pp. 469-1475).

38. Opinion filed March 19, 1957 (RV2, pp. 152-163).

39. Findings of facts, conclusions of law, and order of dismissal filed March 19, 1957 (RV2, pp. 164-172).

Trial Setting and Pretrial Conference:

On November 7, 1956, the Clerk of the United States District Court for the Southern District of Florida gave notice that the case was set for trial at Miami, Florida, on February 25, 1957, at 9:30 a.m., before Judge Edgar Vaught, main post office building (Appendix A, Appellants' Brief, Appellate Case No. 16,817), and on January 10, 1957, the Honorable Emmett C. Choate, United States District Judge, entered the order setting a pretrial conference before that judge in his chambers at 3 o'clock p.m. on the 25th day of January, 1957, with copies to counsel for all parties (RV2, p. 69).

Counsel for Plaintiff and Intervenor could not attend (RV2, p. 93), and the pretrial conference was held over until January 31, 1957 (RV2, p. 80). At that time the Plaintiff advised the court of an undisposed motion, *filed by the Plaintiff on September 15, 1950*, seeking permission to examine the records and accounts of the Family Loan Company, as respects its dealing with Sol Meyer during his lifetime. During that conference the court observed

> The Court; "You can tell the court up there that this court was set and is the oldest case on our docket, it is seven years old and we are going to try it unless some very, very pertinent reason is presented why it should not be tried." (RV2, p. 108).

The court required service of lists of intended exhibits, the Plaintiff being required to submit his list of intended exhibits eight days prior to the trial date and Defendants seven days prior to trial date (RV2, p. 110) and notified all counsel that

> The Court: "Well, nothing less than a formal notice for continuance will be considered further and that will have to be an affidavit in all formality and I will rule on it as quick as I get it. I will do that

so none of you will be up in the air. I do not know of anything else that we can do about it. Counsel, it is my intention to try this case unless there is some very, very good reason that has not been mentioned so far or brought up." (RV2, p. 109).

Motion for Continuance and Order Thereon:

On February 21, 1957, Plaintiff filed his Motion for Continuance (RV2, p. 112). The Motion came on for hearing on that day before the Honorable Emmett Choate, United States District Judge. In denying the Motion for continuance, the court said

The Court: "Well, as I told Mr. Darlington here, I am always anxious to oblige counsel from other states. But on the other hand, this particular case is the oldest case that I know of in this Court. I think it is about seven years old. This Court calendar is crowded. I cannot pick it up and put it in another week or another month without causing a lot of confusion and a lot of difficulty. It is true that he may have engagements in other courts, but apparently this engagement is first. And I think those other courts, at least I would if such were the case, should have the courtesy to step aside for this engagement, if this case runs over.

Now, of course, if there are records in Puerto Rico, it is only a matter of a few hours to go to Puerto Rico, if somebody wants to go over there to pick up the records. He certainly must know over the years what records he will need in this case. Of course, he certainly can order them from Puerto Rico and have them sent up. I am going to deny the continuance for those reasons and for the further reason that I think that justice must be served by prompt litigation.

I think that too often courts and lawyers, too, fall into the bad habit—I do not think they do it knowingly or deliberately—by delaying causes unduly. It makes

it more complicated and it often defeats justice. Certainly, these Defendants have a right to complain and they have a right to have their day in court and be rid of this case, whichever way it falls."

SUMMARY OF RESPONDENTS' ARGUMENT.

The trial judge, Honorable Edgar S. Vaught, retired United States District Judge, Western District of Oklahoma, Tenth Circuit, presided at the trial and the decision of the case, under assignment by Chief Justice Earl Warren of the United States Supreme Court by designation dated December 12, 1956, for the period beginning February 25, 1957, and ending March 22, 1957.

The trial judge was unacquainted with counsel for the Plaintiff and Intervenor and, likewise, did not know counsel for the Defendants. He knew nothing about the case at bar until the day of the trial at which time he met counsel for the first time and heard of this case for the first time.

Since the trial judge was a stranger to the parties and to counsel, it is impossible for the trial judge to have had any preconceived bias or prejudice for or against any of the parties or counsel. These Defendants, Respondents herein, contend that the trial judge exhibited no bias or prejudice against either the Plaintiff or the Intervenor and did not prejudge the case, or make any improper comment during the trial, nor was he guilty of any improper conduct.

The Plaintiff and the Intervenor neglected to prepare for trial. The neglect of the Plaintiff existed from August 14, 1952, when the case was reinstated by a reversing mandate issued by the appellate court, to February 25, 1957, the date on which the trial commenced. The neglect of

the Intervenor existed between November 19, 1954, when the cause became at issue, to the date of the trial, February 25, 1957.

Neither the Plaintiff nor the Intervenor ever attempted to take any pretrial depositions or discovery from any witness or party. The Plaintiff filed a motion for leave to examine the books and records of the Defendants on September 15, 1950, but did not call the motion up for hearing until January 31, 1957, at the Pretrial Conference. As the result of this negligent failure to prepare for trial, Plaintiff and Intervenor had no evidence to present at the trial and attempted to conduct a discovery proceeding under the guise of conducting a trial of the issue. This conduct on the part of the Plaintiff and the Intervenor required the trial judge to keep the "discovery" within the bounds of reason, to interrogate the witnesses from time to time, in order that the court might itself keep the evidence clear in its mind, and to comment from time to time upon the status of the progress of the case. We submit that the trial judge only performed his duty and sought to conduct the trial in an orderly way with a view to eliciting the truth and attaining justice between the parties.

The contention that Plaintiff and Intervenor did not receive a fair trial because of the alleged bias and prejudice of the Trial Judge was thoroughly considered by the United States Court of Appeals for the Fifth Circuit which reached the conclusion that the trial judge was guilty of no improper conduct or comment.

The Plaintiff and the Intervenor had ample opportunity at the trial to present evidence of fraud if any such evidence existed, but they had none, and the evidence they did produce showed that no fraud existed except in their imagination.

Since the trier of facts found against them because of the failure of their proof and the Appellate Court affirmed the Trial Judge, the Petitioners now seek to try both the Trial Judge and the Appellate Court instead of the merits or demerits of their cause.

ARGUMENT.

At the outset we concede that a fair trial by an unbiased and nonpartisan trier of the facts is of the essence of the adjudicatory process. A litigant is entitled to a fair trial in a fair tribunal and that fairness requires an absence of *actual* bias or prejudice in the trial of the case.

However, the bias or prejudice which would disqualify a judge and render a trial unfair, must be a "personal" bias or prejudice as distinguished from a judicial one. *Craven* v. *United States*, 1st Cir., 22 F.2d 605, 607-08. It is not sufficient if the alleged bias or prejudice arises out of the judge's background and associations rather than his appraisal of the complaining party personally. *Price* v. *Johnston*, 9th Cir., 125 F.2d 806, 811; *Eisler* v. *United States*, 83 U.S. App. D. C. 315, 170 F.2d 273, 278. Nor is it sufficient that the alleged bias or prejudice arises from the judge's view of the law. *Lowes', Inc.* v. *Cole*, 9th Cir., 185 F.2d 641, 642.

A trial judge in a federal court is not a mere presiding officer. It is his function to conduct the trial in an orderly way with a view to eliciting the truth and to attain justice between the parties. It is his duty to see that the issues are not obscured. *Fidelity Deposit Co. of Maryland* v. *Bates*, (8th Cir.) 76 F.2d 160, 170.

Trial Judge Meets Counsel and Parties:

On page 10 of the Petition the Plaintiff and Intervenor state that the judge entered the case as a special judge, "a *stranger* to this Petitioner-Plaintiff" on the morning the trial started. Since the Petitioners *allege* that the trial judge was biased and prejudiced *throughout the trial*, we assume that this is an attempt on their part to insinuate that the trial judge was not a stranger to the Defendants and their counsel.

The record (Tr., p. 2) shows that at the opening of the trial the court asked whether the parties were ready, and thereupon Mr. Leo Julian stated that chief counsel for the Plaintiff, Mr. Darlington, had informed him that they were ready and introduced himself to the court and then introduced Mr. Darlington to the court and lastly introduced Mr. Howell, an associate, to the court. The record shows that Mr. Budd introduced himself and Mr. Ward as counsel for all of the Defendants except the Defendant, Seaboard and announced that the Defendants were ready, and thereupon Mr. Ponstel introduced himself and his associate, Mr. Dyer, and another associate, Mr. Chadwick, stating that they represented Seaboard Finance Company and that that Defendant was ready.

The record, by its silence, shows that the Plaintiff and the Intervenor, Mr. R. E. Peckham, was never in attendance at the trial and, therefore, remained a stranger to the court throughout the trial of the case. Incidentally, Mr. Peckham remains a stranger to the Defendants as well since he never appeared in person at any time during any of the proceedings. The Defendants sought to make his acquaintance very early in the case by filing a notice for the taking of his deposition (RV1, p. 21), but this notice was quashed at the request of Plaintiff's counsel on the 10th day of March, A.D., 1949 (RV1, p. 57).

After the introductions the court requested that Plaintiff make a statement of his case (Tr. 3), and Plaintiff's chief counsel, Mr. Darlington, responded. Page 8 of the Transcript shows that Plaintiff's counsel commenced to talk about another case filed and then progressing in Puerto Rico. Counsel for the Defendants (Tr. 10), objected to this, but the court overruled that objection, and listened to the recital of the issues and history of the Puerto Rico case. When the Defendants again objected (Tr. p. 13), the court denied the objection and observed:

> "I just want to find out what the law suit is about."

Counsel continued his opening statement to page 53 of the Transcript, and the court adjourned until 9:30 of the following day. On the morning of February 26 counsel for Defendants made its opening statement, and at the close the trial proceeded. Plaintiff called one of the Defendants, Mr. Ferd S. Meyer, as witness for the Plaintiff, and he remained on the witness stand throughout the day. On the morning of February 27 (Tr. 211), at the opening of court, the Trial Judge announced:

> "Gentlemen, I do appreciate the fact that the court never heard of this case or the parties until the trial started. However, I have read the decision of the Court of Appeals of the Fifth Circuit and also the opinion of the state court in Indiana. I have that information. There are three questions I think that are very important in this case."

The three questions posed by the judge were as follows:

(1) What interest did Sol Meyer have in the Family Loan Company?

(2) What interest did Ferd Meyer have in the Family Loan Company?

(3) What fraud did Ferd Meyer commit in the bankruptcy proceedings?

We submit that, in view of the record, it would be physically impossible for the Trial Judge to have entertained a prejudice or bias against the Plaintiff or against the Intervenor "throughout the trial" as charged by the Petitioners.

Trial Judge Did Not Assume the Role of Defense Counsel:

The Plaintiff and Intervenor charge (PtA 18), that the Trial Judge assumed the role of defense counsel and on the appendix pages 18 and 19 partially quote from Tr. 108-109.

The Defendants' pleadings, which by this time the Trial Judge had read, and the Defendants' opening statement informed the court that it was the Defendants' position that Florence Meyer, who was the wife of the deceased judgment debtor Sol Meyer, the mother of Defendant Ferd S. Meyer, the mother of two mentally retarded, incompetent sons, Sol Meyer, Jr., and Edward Meyer, possessed independent means, and organized the Family Loan Company and furnished all of its original capital out of her own separate estate. That later, on the 16th of February, 1932, from her separate estate, she formed the Florence Meyer Trust for the benefit of her two incompetent sons, Sol Meyer, Jr., and Edward Meyer, and for her grandson, James Meyer, who was only incompetent by reason of minority. The full sequence of related questions which preceded the court's interrogation, which is complained of, is as follows:

Q. Your mother was never an officer of the Miami bank, was she?

A. I don't recall it. I don't recall who the officers were.

Q. Your mother never was any officer of the Indianapolis bank so far as you recall either, was she?

A. I don't recall. She may have been. I think she was a director, but I don't know that.

Q. Your mother did not hold any substantial amount of stock in the Indianapolis bank as far as you recall, did she?

A. I don't know who the stockholders were; so I wouldn't know whether she did or not.

Q. How about yourself? Did you hold any stock in it?

A. I don't think so. I don't know. I don't believe I did. I may have.

Q. Your mother, I take it, was the housewife and homemaker as far back as you recall and did not engage in business as far back as you can remember? is that true?

A. Do you mean go to work every day? Is that what you're talking about?

Q. No, I did not necessarily mean to go to work every day.

A. I know she had money that she invested in various things.

Q. I am not talking about investments. I mean, did she engage, take part in any kind of business that you recall?

A. I don't recall her having any regular job any place.

Q. You do recall that regularly she was home taking care of the family? Is that a correct statement?

A. That was her primary business, yes.

The Court: Do you recall whether or not your mother had an independent estate at that time?

The Witness: Yes, she did.

The Court: Her parents were wealthy people?

The Witness: They were.

Q. Mr. Meyer, from what source did she get this independent estate?

A. I don't know.

The Court: Did she inherit it from her parents or did she—

The Witness: I do not know, Your Honor. I know she was a very thrifty woman and I know she saved her money. Where she may have accumulated monies from, I don't know and I never did know. I know she always had monies that she was willing to give me when my father turned me down (Tr. pp 107, 108, 109).

Since the question of whose money organized Family Loan Company was one of the issues, when the witness testified that he knew that Florence Meyer "had money and that she invested in various things," when counsel for Plaintiff-Intervenor announced that he was not "talking about investments" and failed to pursue the pertinent inquiry, the Trial Judge had the right to interrogate the witness on that very pertinent point, *Hargrove* v. *United States*, 8th Cir., 25 F.2d 258, and these Respondents, like the United States Court of Appeals for the Fifth Circuit, can discover nothing improper in the court's interrogation, and we believe the preceding quotation of the pertinent record shows the complaint of Petitioners to be unjustified.

However, at this point, these Defendants do wish to observe that there is nothing in the record and nothing occurred during the trial which justifies the Petitioners in emphasizing words and phrases in the manner shown in their appendix. Neither counsel for the Plaintiff-Intervenor nor the witness nor the court placed the emphasis on the questions or answers as they appear in the appendix.

The impartiality of the Trial Judge and his interest in learning the facts and his attempt to do his duty and

see that the issues were not obscured was demonstrated by the following questions:

> The Court: Do you know where the money came from that went into that trust?
>
> The Witness: From her own savings, investments or accumulations. That was set up—
>
> The Court: Did your father contribute anything to that trust so far as you know?
>
> The Witness: I know that he never put anything in after the trust was organized. I don't know whether he gave my mother any of that money or not. He may have over a period of years.
>
> The Court: This was organized when? I refer to the trust.
>
> The Witness: I think it was organized in 1930 or '31 when she was alive (Tr. pp. 131-132).

Obviously, those questions were pertinent to the issues and completely within the province of the Trial Judge.

Judge Did Not Exhibit Bias nor Prejudge a Major Issue:

On page 19 of the Petitioners' appendix, the Plaintiff-Intervenor, no doubt inadvertently, misquoted the record by stating: "The Court: (To Plaintiff's counsel during direct examination of same witness Ferd S. Meyer)." We submit that the record shows the above statement to be made in error, if it was intended to convey the impression that the court interrupted Plaintiff's counsel during direct examination.

Immediately following the last quoted questions by the court and the answers by the witness, one of the counsel for the Defendants arose to address the court, and the following took place:

Mr. Budd: Your Honor, if you will permit me to clarify your mind, in all of these pleadings *there has never been an allegation that Sol Meyer ever gave Florence Meyer a nickel. There is no charge of any conspiracy between Sol Meyer and Florence Meyer to conceal any asset of Sol Meyer* (Emphasis supplied).

The reason for such failure of allegation is very simple. The Florence Meyer Trust has been a matter of public record in Indianapolis since 1932, I believe, November of 1932. The plaintiff knows that he cannot successfully claim to be in ignorance of the existence of that trust and, therefore, that was the reason the plaintiff failed to make any such allegations.

Mr. Darlington: May I clear the record here by calling to Mr. Budd's attention and to the Court's attention the fact that Ferd S. Meyer, trustee of this very trust or, rather, successor trustee, as I recall, is a defendant in this action. He is the defendant both individually and as trustee of this very trust. The complaint alleges generally that all of the defendants conspired to carry out this program of concealment.

The Court: Is it your contention now that any part of this Florence Meyer Trust, the capital of that trust, came from the bank or from Sol Meyer?

Mr. Darlington: It is our contention that every penny that was ever in it, except maybe a little jewelry of slight value, was Sol Meyer's money and was put in—

The Court: That is perhaps an imaginative result. There is no evidence so far that that occurred.

Mr. Darlington: There will be a good deal of circumstantial evidence, we think, as the case moves along.

The Trial Judge may and should take an active part in the examination of witnesses if he considers that the course of justice requires it. It is his function to elicit all material evidence and assist in making straight the path

of Justice. *Montrose Contracting Co. v. Westchester County*, 2nd Cir., 94 F.2d 580, 583.

He has the authority to express his opinion upon the weight of the evidence. *Fidelity Deposit Co. of Maryland v. Bates*, 8th Cir., 76 F.2d 160, 170.

The record thus shows, contrary to Plaintiff's statement, that the court did not interrupt the examination of the witness, but on the contrary, merely directed a question to counsel for the Plaintiff following a statement by that counsel as to the extent of Plaintiff's contention with respect to the Florence Meyer Trust. The court's comment that there is no evidence *so far* to support the contention, which Plaintiff's counsel had expressed, is a mere comment upon the evidence which had been produced prior to that point in the trial. Most counsel would have been grateful to the court for indicating his opinion as to the weight of the evidence up to that point since it permitted counsel to promptly present evidence which would actually support the contention, but as we see, at the trial, counsel for Plaintiff contented himself with making the observation and promise that he would introduce evidence supporting his contention. Certainly the record does not bear out Plaintiff-Intervenor's charge that the Trial Judge had exhibited bias and prejudged a major issue.

Next Charge of Judicial Bias:

On page 20 of the Petitioners' appendix, Plaintiff-Intervenor again charges that the judge exhibited bias in favor of the Defendants.

Late in the afternoon of February 28, 1957, counsel for Plaintiff-Intervenor, having introduced the original bound minute book of Family Loan Company covering the period from its inception on April 1, 1930, through Septem-

ber 19, 1942, as Plaintiff's Exhibit 1 (Tr. p. 147), after having indulged in minute and exhaustive cross-examination as to each preceding page in the exhibit, produced the following questions and answers preceding the portion of the record which Petitioner claims demonstrates judicial bias in favor of the Defendants (Tr. pp. 167-170):

Q. I now turn to page 109. These are the minutes of the annual meeting of stockholders. This is on April 1, 1933. It says "The following stockholders were present in person: Rosalyn A. Meyer, forty-seven shares; W. C. Chadwick, one share; A. M. Reder, one share; Ferd S. Meyer, one share." That is the way the typewriting reads. Then there is the name of W. C. Chadwick that has been crossed out with a pencil. Did you cross that out?

A. No, sir.

Q. Do you have any idea as to who did?

A. No, sir.

Q. Do you have any idea as to the reason?

A. No. It looks to me that whoever made this up found that the list was incorrect and said "see minutes attached."

Q. We will come to that in a minute, and we will put that off just so that we do not lose the continuity.

Would you say, if you know, whether or not Chadwick's name was deleted because it was found that he was not present?

A. I don't know.

Q. You do on the second page of those minutes, page 110, recognize Chadwick's signature?

A. Yes.

Q. And Maroon's signature as secretary?

A. Yes.

Q. The next name on the list was typed was A. M. Reder, and that is deleted with a pen and written there in place of it with a pen is the name of H. T. Maroon. Did you write that?

A. No, sir.

Q. Do you recognize the hand?

A. No, sir.

Q. The next name that was typed is Ferd S. Meyer. There has been added with a pen the word "trustee." Did you write that in?

A. No, sir.

Q. Do you recognize who did?

A. No, sir.

Q. You do not know?

A. No.

The Court: Are those stockholders' or directors' meetings?

The Witness: Stockholders, yes.

Mr. Darlington: This, Your Honor, is the annual meeting of stockholders, of April 1, 1933. That is the date fixed in the by-laws for the annual stockholders' meeting. Some of the others to which I have referred in the past have been directors' meetings.

The Court: I understand that.

Q. You started to mention a moment ago that there is written with a pencil opposite the name of Reder and Mr. Maroon the words "(see minutes attached)." That is in the handwriting of Hoke T. Maroon, is it not? I refer to this pencil notation.

A. I couldn't say for sure that it is.

Q. As a result of a long association with Mr. Maroon are you not able to state whether in your best judgment that is Mr. Maroon's handwriting?

A. It could be. It is similar to his handwriting —the words "see minutes attached."

Q. Then there is a pencilled bracket there. Do you see that?

A. Yes.

Mr. Darlington: For the record, there is a pencil line drawn to the right of the penned in name of Mr. Maroon and there is a bracket enclosing the one share

opposite Maroon's name and one share opposite Reder's name.

Q. That is a correct description, is it not?

A. Yes.

Q. And following that are these pencilled words "see minutes attached"?

A. That's right.

Q. Are you able to give us any explanation as to why Chadwick signed the minutes as chairman which you identified on the second page and then his name had been crossed out of the list of those present?

A. No, I can't. He may have been present. It occurs to me that that's about the time Mr. Maroon was taking over the active operation of the Family Loan Company from Mr. Chadwick. Mr. Chadwick had been more or less the supervisor up to then, and I think from that time forward Mr. Maroon took over (Tr. pp. 167-170).

The record (Tr. pp. 145-146), shows that the minute book, Plaintiff's Exhibit 1, includes two pages of title history of the common stock of Family Loan Company with a table showing the history and dates of transfer of stock from April 1, 1930, down to April 20, 1949. That portion of the exhibit shows that Certificate No. 2 was originally issued on April 20, 1930, to W. C. Chadwick for one share and was cancelled and reissued as Certificate No. 12 on April 1, 1933, for one share to H. T. Maroon. The table shows that Certificate No. 3 was originally issued for one share on April 20, 1930, to A. M. Reder, and that this certificate was cancelled and reissued as Certificate No. 11 for one share in the name of H. T. Maroon on April 1, 1933. It also shows that Certificate No. 4 for one share was issued to Ferd S. Meyer on April 20, 1930, and that this certificate was cancelled and reissued, as Certificate

No. 10, for one share on January 20, 1932, in the name of Sol Meyer and Ferd S. Meyer, trustees for Sol Meyer, Jr., Edward Meyer, and James Meyer, *i. e.*, the Florence Meyer Trust.

In Defendants' opening statement the court was informed that Florence Meyer told her son Ferd S. Meyer, that she wanted the corporation to be organized with Ferd Meyer, W. C. Chadwick, and A. M. Reder as the subscribing incorporators, the charter providing that Ferd Meyer subscribe to 98 shares, W. C. Chadwick to one share, and A. M. Reder to one share. The opening statement disclosed that when the charter was issued, Mr. A. M. Reder, who was the attorney handling the matter and who was named secretary in the charter, prepared Certificate No. 1 for 98 shares to be issued to Ferd Meyer, Certificate No. 2 for one share to be issued to W. C. Chadwick, and Certificate No. 3 for one share to be issued to A. M. Reder, and that the issuance of the shares was disclosed to Florence Meyer who was the true owner of all of the shares, and thereupon she objected and instructed the incorporators that she wished Share No. 1 to be cancelled and reissued with one share to Ferd Meyer and 97 shares to be issued in her own name (Tr. pp. 65-66). That statement further disclosed that the Defendants admitted that Chadwick, Reder, and Ferd Meyer held Certificates Nos. 2, 3, and 4, each for one share, as the nominees for the true owner, Florence Meyer, who thereafter on the 16th day of February, 1932, created the Florence Meyer Trust, and those shares were then held as the nominees for the true owner of the stock, to-wit: The Florence Meyer Trust (Tr. p. 68). Four days later, on January 20, 1932, Ferd Meyer transferred the share standing in his name to the Florence Meyer Trust (Tr. p. 69).

So the witness was merely explaining to counsel for the Plaintiff that on that date Mr. Maroon had taken over the active operation of the company and had likewise taken over the two shares of stock so that he became the nominee for the true owner, the Florence Meyer Trust. At this point followed the exchange between the Trial Judge and Plaintiff's counsel concerning which the Petitioners now complain (Tr. pp. 170-172):

> The Court: How is that material?
>
> Mr. Darlington: Your Honor, in this kind of a case a plaintiff cannot expect any direct admissions against interest by the witness and—
>
> The Court: You ought to base it on something other than just mere suspicion, you know.
>
> Mr. Darlington: It is something other, and let me refer Your Honor to that famous statement of Justice Storey which is quoted in so many of the cases to this effect: Concealment and secrecy are the handmaidens of fraud.
>
> Very seldom can a plaintiff produce direct proof or testimony of fraud, but circumstances which may appear trivial in themselves may in their co-relation with other circumstances in the case ultimately produce conviction exceeding all testimony.
>
> The Court: While that is very important, nothing is more important than to charge a man with fraud unless you are able to prove it.
>
> Mr. Darlington: I consider that the charges were well-founded at the time the complaint was filed, and as my investigation proceeds and the evidence develops, I am increasingly convinced of that and I hope to be able to convince Your Honor. Of course, it would not have been appropriate for me in the opening statement to list a great many separate details that I expected—
>
> The Court: There is nothing in what you have produced here this afternoon getting down to facts.

There is not a single statement there which you could construe as fraud in any way.

Mr. Darlington: It is not merely the written statements. It is the fact that there is a certain pattern of alterations. I am not asking Your Honor to make a finding upon these alone. Naturally, I expect to produce a further pattern of alterations and circumstances arising partly from the records of the defendants and partly from their testimony, the circumstances contained in their testimony.

The Court: Very well. Let us get along and let us have the evidence.

Since the record, which was before the Trial Judge, showed that on April 1, 1933, the stockholders of Family Loan Company were:

Sol Meyer and Ferd S. Meyer, Trustees of the Florence Meyer Trust, Certificate No. 10 for one share, value $10;

H. T. Maroon (Nominee of the Florence Meyer Trust), Certificate No. 11, one share, value, $10; and Certificate No. 12 for one share, value, $10;

Rosalyn A. Meyer, Certificate No. 7 for 47 shares, value, $470;

Cecile A. Kiser, Certificate No. 8 for 25 shares, value, $250;

M. S. Cohn, Trustee for Gordon and Diane Cohn, Certificate No. 9 for 25 shares, value, $250.

It seems that the fact that the name W. C. Chadwick had been stricken from the list of "stockholders" was completely immaterial even though he signed the minutes. The immateriality is even clearer when we remember that the record discloses that the Defendants had freely admitted that Mr. Chadwick never was the real owner of that share of stock. Therefore, when the Trial Judge

asked Mr. Darlington, "How is that material?", he was seeking information as to how that line of interrogation could possibly bear on the question of fraud. It must be admitted that the answer given by counsel for Plaintiff-Intervenor was hardly informative. The remarks which followed, exchanged between the Trial Judge and counsel, certainly indicated no personal bias or prejudice in favor of the Defendants or against Plaintiff-Intervenor or his counsel. They were merely an expression of the legal opinion held by the Trial Judge as to the weight of the evidence which had been produced by the Plaintiff-Intervenor up to that point, and the court's concluding remark constituted an attempt on the part of the Trial Judge to prevent the issues from being obscured and to keep the case moving within the bounds of reason, as it was his duty so to do. 53 Am. Jur. 87, Trial, § 97.

> "It is also settled law in this court that the trial court is authorized to regulate the order of the introduction of evidence, and its discretion in this matter will only be interfered with by an appellate court where clearly abused. See Pittman v. State (decided here at the present term), 41 So. 385, and authorities therein cited; 15 Ency. Pl. & Pr., 383 et seq.; Abbott's Trial Brief, Civil Jury Trials (2d Ed.), 114, 120."
>
> *Hoodless* v. *Jernigan*, 51 Fla. 211, 41 So. 194, 195.

This doctrine is, we believe, settled law in all jurisdictions. A court cannot be called upon to admit irrelevant, impertinent, or immaterial matter, but must take care that the evidence on which it shall be called upon to act is legal and that it conduces to the issue on behalf of either the Plaintiff or the Defendant. *Roach* v. *Hulings*, 16 Pet. (U.S.) 319, 10 L. Ed. 979. It seems clear that the Trial Judge was of the opinion that this particular line of questioning did not tend to produce anything having a bearing upon the issues. The Petitioner-Intervenor contends that the rulings com-

plained of indicate prejudice against the Plaintiff-Intervenor and in favor of the Defendants. But courts forbid any deduction of bias and prejudice from adverse rulings by a judge, whether they are right or wrong. Thus, prejudice on the part of a judge cannot be deduced merely because of error in ruling against a party to a cause upon a question of law. A holding of a trial judge is not evidence of his disqualification to try the case, on the ground of prejudice, where the appellate court reaches the same conclusion on the merits. *30A Am. Jur. 106, Judges, § 204.* In the case at bar the appellate court reached the same conclusion on the merits as was reached by the Trial Judge.

Fourth Attack on Trial Judge:

On page 21 of the Petitioners' appendix, Plaintiff-Intervenor again attacks the conduct of the Trial Judge. They charge that *during Plaintiff's direct examination of the same witness, Ferd S. Meyer, the judge again intervenes with leading questions to Defendant-Witness, Ferd S. Meyer, and draws self-serving answers or ultimate fact issue.* In the opinion of these Defendants the language used by Petitioners is a deliberate attempt to becloud the issue and mislead this court.

The record shows that the court opened at 10 a.m. on February 27, 1957 (Tr. p. 210), and the court immediately addressed the parties (Tr. p. 211), and said (Tr. p 214):

> The Court: "I am not asking about that. I am asking about these three propositions right here. What I am interested in right now is what interest did Sol Meyer have in this Family Loan Company, and what interest did Ferd Meyer have, and then following that would be the bankruptcy proceedings. It seems those three propositions constitute the gist of this law suit, and I think we might limit our testimony to those propositions."

Then followed discussions by counsel and the court and upon the witness assuming the stand, the court opened the proceedings by interrogating the witness:

> The Court: At this point, this may have been covered by your testimony yesterday, but I think the question was asked you, to your knowledge did Sol Meyer make any investment in the stock of the Family Loan Company?
>
> The Witness: No, sir, he did not.
>
> The Court: Ever at any time?
>
> The Witness: Never at any time.
>
> The Court: Did you make any investment in the loan company prior to the time that you and your associates assumed the active management of this company? Was there any investment made in that?
>
> The Witness: No, sir. That was all that was put in. I had one share which my mother gave me as part of the qualifying shares, and which was disposed of by me about a year after she gave it to me. Except for that one share, I had nothing invested in the Family Loan Company until Mr. Maroon and I were interested in it in 1940.
>
> The Court: You may proceed (Tr. pp. 217, 218).

Defendants say that the court's questions were not leading but were extremely pertinent and gave counsel for Plaintiff-Intervenor the opportunity to discredit the testimony of the witness within the framework of the three issues which the Trial Judge had indicated as being the order of the introduction of evidence. The record shows that Plaintiff-Intervenor disregarded the court's ruling as to the order of the introduction of evidence and proceeded with his examination of the witness as if conducting a pre-trial discovery deposition.

It seems clear that Plaintiff-Intervenor is overcritical of the Trial Judge without any real basis for that criticism.

The United States Court of Appeals for the Fifth Circuit was of the opinion that there is no merit to their contention.

Judge Considers Question Ridiculous and Out of Line:

The fifth charge of misconduct which Petitioners make against the Trial Judge involved the original share of stock which Ferd S. Meyer originally held in the company as the nominee of his mother, Florence Meyer. Plaintiff's Exhibit 1 (Tr. p. 147), showed the title history of the common stock of Family Loan Company with a table showing the history of issuance and dates of transfer of each certificate (Tr. pp. 145-146). Plaintiff was examining the witness with respect to that one share and was using the original stock book, Plaintiff's Exhibit 2 (Tr. p. 172), as the basis for examination. It must be remembered that Sol Meyer died November 18, 1939 (RV2, pp. 90-91). Certificate No. 4 had been issued to Ferd Meyer for one share on April 20, 1930, and had been cancelled on January 20, 1932, and reissued as Certificate No. 10 for one share to Sol Meyer and Ferd S. Meyer, trustees for Sol Meyer, Jr., Edward Meyer, and James Meyer (the Florence Meyer Trust). Certificate No. 10 showed that it had been endorsed for transfer to H. T. Maroon on October 19, 1940, and Plaintiff-Intervenor's questions concerned the endorsement on the back of Certificate No. 10. The exchange of questions and answers, objections by Defendants, and observations by the court are as follows:

> Q. This Certificate No. 10 is endorsed on the back "Ferdinand S. Meyer surviving trustee." That is your handwriting, is it not?
>
> A. Yes, it is.
>
> Q. It is written in pencil. Is there any reason for your writing it in pencil rather than pen?
>
> A. No special reason.

Q. For instance, was it written in pencil to show that the signature could be—

Mr. Bonsteel: Your Honor, we cannot hear counsel.

Mr. Darlington: I am sorry.

Q. Was it written in pencil for the purpose of making the signature so it could be erased at a later date if desired and another name such as Sol Meyer's name as trustee substituted?

Mr. Ward: If Your Honor please.

The Court: I think the question is ridiculous. I do. I think your question is out of line.

Mr. Darlington: If Your Honor please, there will be other evidence—

The Court: I understand, but I do not think you have any right to ask a witness if he is a crook on the witness stand. He is your witness now.

Mr. Darlington: He is an adverse witness. Rule 43 says I have the same right as on cross examination, and I am not placing it as to whether he is a crook. I am asking him a definite fact.

The Court: Do you know any reason why that was signed by pencil?

The Witness: I do not, Your Honor.

The Court: It is your signature?

The Witness: It is my signature, and the time it was signed, which was, I think, in 1940, my father was dead, and I certainly would have had no thought—I was the only trustee that could have signed at that time. My son was still four years away from majority when he became a trustee, and I don't know what would be implied by the question (Tr. pp. 233-234).

The Trial Judge was perfectly justified in thinking the question ridiculous. The face of the certificate showed that it was issued to Sol Meyer and Ferd S. Meyer, trustees for the Florence Meyer Trust. It was endorsed by

Ferd Meyer as "surviving trustee" at a time when Sol Meyer was dead. The insinuation made by Plaintiff-Intervenor's counsel that the witness was guilty of or planning a "fraud" is conduct which fails to comply with the Canons of Professional Ethics:

> "18. Treatment of Witnesses and Litigants. A lawyer should always treat adverse witnesses and suitors with fairness and due consideration, and he should never minister to the malevolence or prejudices of a client in the trial or conduct of a cause. The client cannot be made the keeper of the lawyer's conscience in professional matters. He has no right to demand that his counsel shall abuse the opposite party or indulge in offensive personalities. Improper speech is not excusable on the ground that it is what the client would say if speaking in his own behalf."
>
> *Canons of Professional Ethics adopted by the American Bar Association at its 31st annual meeting at Seattle, Washington, on August 27, 1908.*

The mildness of the court's comment is additional proof that the Trial Judge had no prejudice or bias against the Plaintiff-Intervenor. It is undoubtedly within the province of the Trial Judge to admonish and rebuke counsel when guilty of misconduct, as the occasion may require, and use other preventive measures to maintain the dignity of the courts. 53 *Am. Jur. 83, Trial,* § *90.*. We submit that this conduct on the part of counsel was hardly the candor and fairness in dealing with the facts which is required by Section 22 of the Canons of Professional Ethics.

Ink Eradicator and Expert Witness Incidents:

On pages 23 and 24 of their appendix, the Petitioners complain that the Trial Judge interrogated their counsel as to the materiality of a line of interrogation with respect to

a charge advanced by counsel that an ink eradicator had been used on the back of Stock Certificate No. 7. This incident took place on the morning of February 27th and is shown in the Transcript at pages 235-237. The history of this certificate as shown by the stock book, Plaintiff's Exhibit 2, and by the historical table showing the original issue and transfer of certificates, which was part of Plaintiff's Exhibit 1, is as follows:

> Stock Certificate No. 5 for 97 shares was issued to Florence S. Meyer on April 20, 1930. On December 1, 1930, Florence S. Meyer endorsed that certificate for transfer, and the transferees were as follows:
>
> Certificate No. 7 for 47 shares was issued to Rosalyn A. Meyer on December 1, 1931;
>
> Certificate No. 8 for 25 shares was issued on December 1, 1931, to Cecile A. Kiser; and
>
> Certificate No. 9 for 25 shares was issued on December 1, 1931, to M. S. Cohn, trustee for Gordon and Diane Cohn.

Rosalyn A. Meyer, under date of October 15, 1940, endorsed Certificate No. 7 for transfer to the following transferees, and the following certificates were issued:

> Certificate No. 22 for one share was issued on October 19, 1940, to Rosalyn A. Meyer,
>
> Certificate No. 24 was issued on October, 1940; for 40⅔ shares to Ferd S. Meyer, and
>
> Certificate No. 25 was issued on October 19, 1940, for 5⅓ shares to H. T. Maroon.

The record discloses that on the morning of February 27, Petitioners' counsel, in examining the back of Certificate No. 7, conceived that a portion of the green printed border had been eradicated by the use of a fluid ink eradicator, and he interrogated the witness, Ferd Meyer, as to the use of such an eradicator, but the witness denied all knowledge of any such incident.

The court then interrogated counsel as to what difference it would make as to whether an ink eradicator had been used to eliminate the name of a person *signed in a place reserved for a witness* to the signature of the owner in making the transfer. Counsel responded that it would make a "great deal of difference" *but declined to explain his theory to the court.*

"As a general rule, a party offering evidence must show its relevancy, materiality, and competency, and when he seeks to introduce evidence which does not appear to be relevant or competent, or propound to his witness an interrogatory which appears to call for an irrelevant or incompetent answer, he should make a formal offer of proof showing what testimony he proposes to adduce, and, when necessary, his intention to prove other facts which will render the evidence relevant or competent; the purpose for which apparently irrelevant or incompetent evidence is offered should be disclosed." *53 Am. Jur. 88, Trial, § 99.* T. p. 237 shows that when the court asked "What difference would it make?", counsel responded, "It makes a great deal," to which the court said, "What is it? Let us know what it is." Obviously, the court was making a proper inquiry as to the purpose of and the materiality of this line of questioning. But counsel failed to explain but did inform the court, "If Your Honor please, I did not intend to ask him any more along that line." It will be noted that the court's inquiry was proper and even despite the apparent irrelevancy, immateriality, and incompetency of the evidence, the court took no steps to exclude it, and after counsel had stated that he did not intend to pursue the line of questioning, the court observed, "Let us go to something else. He answered your question." We are at a loss to understand the thinking which caused Plaintiff-Intervenor to cite this incident as evidence of bias and prejudice against him on the part of the Trial Judge.

It is, however, important to note that the incident above referred to took place on the morning of *February 27th.*

Late in the afternoon of *March 12th* on the closing day of the trial, counsel for Plaintiff-Intervenor finally disclosed the theory and purpose behind the line of questions above referred to (Tr. pp. 1444, 1445). This disclosure appears in Petitioners' Appendix page 37.

Counsel for Plaintiff-Intervenor informed the court that he had arranged to have an expert present to examine Certificate No. 7 from Plaintiff's Exhibit No. 2 to "See if he can, without leaving the court corridors restore the original eradicated signature and date on the endorsement on the 47-share certificate of Rosalyn Meyer." The court observed that it would be immaterial, and counsel for the Plaintiff-Intervenor for the first time answered the question which the court had propounded to him on February 27th, as follows:

> "I have reason to believe I could show that instead of it occurring in October, 1940, as it is now written on there in the hand of Ferd Meyer with a pencil, that the true date was prior to Sol Meyer's death, and that instead of the witness being what is now written on there, the signature of Ferd Meyer, that the witness was Sol Meyer."

Counsel was not completely frank with the court even in that explanation since the real theory is set forth on page 64 of "Appellants' Brief" in Appellate Cause No. 16,817, lately pending before the United States Court of Appeals for the Fifth Circuit as follows:

> "It was and is our theory that Sol Meyer had her endorse this certificate in blank date, that he signed the endorsement as witness, and kept the certificate as his *own* down until his death in November, 1939. But when it later became necessary for Ferd to take the

> position that his wife, Rosalyn, owned this certificate down to October 15, 1940, he had to eradicate Sol Meyer's witness signature because Sol had died in November, 1939, and could not witness her transfer of the stock in 1940."

The trouble with this theory, as stated by Plaintiff-Intervenor, is that he had failed to introduce any evidence whatsoever to support it. These Defendants are without knowledge as to whether the break in the ink border was a printing error or whether in truth and fact a name had been signed in the space and removed by ink eradicator. If one must speculate, it is as easy to speculate that in signing the stock certificate, Rosalyn Meyer originally made a mistake and signed in the blank reserved for the witness instead of signing in the blank where her name must appear as transferror. That is pure speculation although it has more merit than the speculative theory advanced by Plaintiff-Intervenor.

As we have seen, counsel had stated as early as February 27th that *in his opinion* the Transfer Form, on the back of Stock Certificate No. 7, showed evidences that an ink eradicator had been used to remove the signature of the original witness. However, he took no steps to introduce any evidence that any erasure by chemical means or otherwise had actually been performed. He introduced no evidence that there was any original eradicated signature or date although he had had thirteen days intervening, and his request for permission to perform an experiment was based purely on his speculation and suspicion. He could not assure the court with any certainty that the results of such an experiment would bear out his accusation. It is fundamental that:

> "The admission of evidence of experiments or permitting them to be performed in court is a matter pe-

culiarly within the discretion of the trial judge, and this discretion will not be interfered with unless it is apparent that it has been abused. *Permission to perform such experiments cannot be demanded as a matter* of right. It is within the discretion of the trial court to permit or refuse to permit experiments but it is necessary to determine first whether there is such similarity of circumstances as to render the evidence competent."

20 Am. Jur. 628.

Counsel for Plaintiff-Intervenor did not inform the court of how much time the proposed experiment would require. It is obvious that such an experiment would have required a suspension of the trial for the period of time during which the proposed experiment was under way. As was said by the United States Court of Appeals, Fourth Circuit, in the case of *Moyer v. United States of America*, 206 F.2d 57, the suspension of a trial to enable a party to secure additional evidence is within the discretion of the trial court which properly denies a motion therefor where the party offers no explanation of his unpreparedness at the trial and no assurance that the delay would enable him to procure the proof necessary to sustain his contention.

"It has been said: 'Fraud is odious and not to be presumed.' In the ordinary transactions of life, fairness and honesty are presumed, and contracts or business transactions are presumed to have been made in good faith, until the contrary is established.

"The party who alleges fraud must establish his contention by stronger proof than would be necessary to show a mere debt or sale, for the reason that he must rebut the presumption of innocence and honesty."

Schweitzer, Cyclopedia of Trial Practice, Volume 1, pages 419-420.

Plaintiff-Intervenor had offered no proof of any fraud nor had he offered any proof that the requested experiment would produce proof of fraud. We submit that he had 13 days, from the time when he first expressed his suspicion, within which to have the document examined by alleged experts. We submit that the court was justified in summarily rejecting permission to conduct an experiment which would have required suspension of the trial for an undetermined length of time.

Unjustified Complaint of "Personal Attack" by Defendants' Counsel:

The Plaintiff-Intervenor on pages 24-25 of Petitioners' appendix complains that the Defendants' counsel made a personal verbal attack on the conduct of Plaintiff's counsel. The appendix presents quotations from the record without citation. However, the cited portion appears at Tr. pp. 264-265. It may be that the Petitioners were attempting to save space, but the quotation from the record does not truly present the entire picture of what transpired. We refer the court to the preceding pages of the record, 261, 262, 263. Where the witness, Ferd S. Meyer, testified as to the book value of the common stock showing that it was originally $1,000 and remained at that figure until December, 1939, when it was raised to $10,000 where it remained until April, 1942, when it was raised to $20,000 where it stayed until 1943, when it was raised to $30,000, and in 1944 it was raised to $121,000, and in 1946 it was raised to $141,000, and in 1947 it was raised to $297,000. Then followed testimony from the witness that he was not a stockholder between 1932 and 1940 but that in that latter year he became the owner of 40 2/3 shares of the stock by a transfer from his wife. Counsel for the Plaintiff (Tr. p. 263), inquired as to the source from which the witness ob-

tained the figures, and the witness informed him that the figures came from the certified public accountant's audits of the company which were in the court room and available to counsel. Thereupon one of the counsel for the Defendants stated that those records, the certified audits commencing from the beginning and being semi-annual in nature, had been submitted for examination to counsel for the Plaintiff on January 31 and that they have been available ever since and were brought into the court and tendered there for the consideration of counsel for the Plaintiffs and that the Defendants formally tendered these records for submission to the court. It was then (Tr. p. 264), that counsel for the Plaintiff said,

> "Mr. Ward, I accept your tender. Will you please hand me the stock book and stubs and canceled certificates covering the period from 1940 to 1950?"

It was apparent to everyone in the court room that counsel for Plaintiff-Intervenor was deliberately misinterpreting the offer made by Mr. Ward, counsel for the Defendants, and was attempting to confuse either the trial judge or the record.

This type of conduct has been universally frowned upon by the courts and is classified as misconduct of counsel.

> "Other instances of misconduct are the willful bringing in or attempting to bring in of irrelevant, previously excluded, or incompetent evidence for the purpose of prejudicing the opposing party; the persistent pursuit of an incompetent course of questions; the making of statements of alleged facts in guise of questions propounded to witnesses."
>
> 53 Am. Jur. 360, 361, Trial, § 459.

Counsel for these Defendants did not wish either the court to be misled or the record to be doubtful as to the

misconduct of Plaintiff's counsel in this instance and of his persistent violation of the other examples of misconduct above referred to and called the court and counsel's attention to what seemed to Defendants' attorneys to be flagrant misconduct on the part of Plaintiff's counsel. However, the Trial Judge brushed the matter aside, merely observed, "Let us get along." (Tr. p. 265).

If the Trial Judge had been prejudiced against Plaintiff-Intervenor "throughout the trial," such a prejudiced judge would not have missed this opportunity to admonish counsel for Plaintiff-Intervenor as he had every right to do under the circumstances.

Trial Judge Justified in Stopping a Line of Questions on His Own Motion:

The Trial Judge in a federal court is more than a mere arbiter to rule upon objections as to evidence and to instruct the jury as to the law. He may and should take an active part in the examination of witnesses if he considers that the course of justice requires it. It is his function to elicit all the material evidence and to assist in making straight the path of justice, *Montrose Contracting Co.* v. *Westchester County,* 2d Cir., 94 F.2d 580. In making straight the path of justice, he may, of his own motion, exclude irrelevant matter in order to confine the trial to the issue before the court. *Payton* v. *Village of Morgan Park,* 172 Ill. 102, 49 N.E. 1003.

The Petitioners complain, on page 25 of their appendix, that the judge made his own objections and then sustained them.

On the afternoon of February 27, 1957, counsel for Plaintiff-Intervenor was examining the witness, Ferd Meyer, with respect to Certificate No. 14 for five shares

which Exhibit 2 showed to have been a reissue of part of Certificate No. 9 for twenty-five shares, formerly owned by M. S. Cohn, trustee for Gordon and Diane Cohn. Certificate No. 14 was issued to Leslie Meyer (Tr. p. 271). Then followed a series of questions about Leslie Meyer, and his means of livelihood, until the court (Tr. p. 281), asked counsel how these questions were material. Counsel responded that he wanted to develop circumstances to show light on whether Leslie Meyer was a *bona fide* stockholder or a "stooge for Sol Meyer or Ferd Meyer." Thereupon one of the counsel for Defendants announced that there was no secret about the matter, that the stock was not the stock of Leslie Meyer but actually belonged to the Florence Meyer Trust, and they were willing to stipulate to this. This offer to stipulate was refused, and the Trial Judge listened to a long series of statements by counsel for Plaintiff-Intervenor addressed to the court and then asked the witness whether he knew anything about this particular five shares of stock, to which witness answered he did, that it was issued to Leslie Meyer for the reason that when the twenty-five shares were purchased by the Florence Meyer Trust from the Cohn family, it was reissued in five-share lots to Leslie Meyer, Joe Maroon, V. McDaniel, H. T. Maroon, and H. F. Ireland in order that the company not fall within the purview of the Personal Holding Company Act and that upon being issued, each of the individuals immediately endorsed the certificate and redelivered them to the Florence Meyer Trust which continued to hold them (Tr. p. 284). Thereupon counsel for Plaintiff-Intervenor reiterated the questions asked by the court and again developed from the witness that Certificates Nos. 14, 15, 16, 17, and 18, each for five shares, were issued in the name of those nominees who held them for the Florence Meyer Trust and that

those stockholders of record did not have a nickel of their money invested in the stock (Tr. p. 285). That counsel then asked whether there had been any previous incident where some stockholder was holding stock in their name which in reality belonged to someone else, and the witness responded that there was such a previous incident, that being the qualifying shares held by himself, Rader, and Chadwick, as to which he had already testified. The witness was then asked whether that incident was for the purpose of evading the Personal Holding Act, and the witness responded that he did not believe the act was in effect at the time when he, Rader, and Chadwick acted as nominees for Florence Meyer but that as to the incident with respect to the shares held by Joe Maroon, V. McDaniel, H. T. Maroon, and H. F. Ireland, the shares were issued to them because of the Personal Holding Company act, and thereupon counsel for Plaintiff-Intervenor (Tr. p. 286), asked, "You do recall they were specifically set up that way. Now, just tell us what events you recall." Then followed the interchange between court and counsel of which Petitioners complain (PtA 25).

> "Where evidence is manifestly improper the court may, in its discretion, reject it whether or not it is properly objected to. * * *.
>
> "The court may reject irrelevant evidence on its own motion or upon objection. * * *. The Court should not permit irrelevant examination which has a tendency to create prejudice."
>
> 88 C.J.S., pages 197, 198, § 90.

Where proposed evidence is irrelevant or immaterial to the issues on trial, and therefore, inadmissible, the court may exclude it on its own motion, *Kimic* v. *San Jose Los-Gatos Interurban Railway Co.*, 156 Cal. 379, 104 Pac. 986; *Rosenberg* v. *Sheahan*, 148 Wis. 92, 133 N.W. 645.

An examination of the transcript of record, from page 271 through page 286, will disclose that the Plaintiff-Intervenor was wasting time and that most of his interrogation concerning the certificate was completely irrelevant and immaterial since it related to matters not in issue at the trial. When counsel said to the witness, "Now, just tell us what events you recall," that question was definitely not directed to any issue involved in the trial, and the court properly labelled it argument. Since it was too general to be a proper method of seeking to test the creditability of the witness, the court was justified in attempting to limit the examination to matters material to the issue before it.

Counsel for Plaintiff-Intervenor did not let the matter drop there but on this occasion, as happened constantly throughout the trial, continued to argue with the court (Tr. p. 287), and on Transcript 288 through 289 was permitted to ask the witness the questions which the court had first ruled out. This long series of immaterial questions was eventually halted by an objection made by Defendants that the interrogation along this line was clearly immaterial. This objection was sustained, and the Trial Judge stated (Tr. p. 292), "The court is getting awfully tired of this persistent examination on matters that are wholly immaterial. If you have any evidence now on the real issues in this case, present them."

We submit that the Trial Judge was eminently correct in attempting to keep the examination to the issues, and that if he made an error on that particular occasion, it is a harmless error since the counsel was then permitted to pursue his wholly irrelevant line of examination until eventually stopped by a proper objection being interposed by the Defendants.

Questions Bordering on the Ridiculous:

The Petitioners complain that an exchange of words between counsel for Defendants and counsel for Plaintiff-Intervenor and the observations of the Trial Judge directed to counsel for all parties is indicative of prejudice on the part of the Trial Judge. The exchange complained of is shown in the transcript, pages 328-330 (PtA 26).

In order to understand the exchange of words between counsel and the observation of the court, complained of, we must go back to the second day of the trial. The witness, Ferd S. Meyer (Tr. p. 126), testified that in 1940 he and Mr. Maroon took over the company and (Tr. p. 129), that they caused the capital to be eventually increased by about $200,000 and that he put in perhaps $80,000 and that Maroon put in one third of the amount of the increase. During the morning of the third day of the trial, the witness testified that Maroon secured some of the money from loans and that as to the source of the rest, he had no information (Tr. p. 259), and being further interrogated as to the exact amounts, he testified that he could not state the exact amount of monies without analyzing the audits (which were in the court room) (Tr. p. 260), and then testified specifically as to the increases in the capital stock and the years in which those increases occurred (Tr. p. 261); he stated that in 1940 he became the owner of 40 2/3 shares and that Maroon became the owner of 33 1/3 shares (Tr. p. 262). In the afternoon of that day counsel for Plaintiff-Intervenor was interrogating the witness about the twenty-five shares of stock which were part of the twenty-eight shares that Maroon had purchased from the Florence Meyer Trust on the 19th day of October, 1940, and asked the witness (Tr. p. 328), whether Maroon bought it on that date, to which

the witness responded, "Yes". Counsel then asked, "How much did he pay for it?" and the witness replied, "I don't recall the exact amount".

Counsel for Plaintiff-Intervenor then indulged in a line of sarcastic questions which were eventually objected to as being argumentative, and the court ruled the questions to be pure argument, but counsel for Plaintiff-Intervenor was not satisfied to accept a ruling of the court but again injected a sarcastic and improper statement into the record as follows, "I want to find out what his recollection is as to whether Hoke Maroon gave him as trustee of this trust $1 or $10,000 or what".

If that was the actual desire of counsel, he could have obtained that information by proper questioning, and in fact, he did receive the answer on page 336 of the transcript where he was referred to the auditor's report of October, 1940, which had always been available to him.

The conduct of Plaintiff-Intervenor's trial counsel toward the witnesses has already been commented on, and it may be that one of the counsel for the Defendants did display justifiable indignation while objecting to the improper harassment of the witness in trying to require the witness to rely on memory when records were available.

It will be noticed that the Trial Judge was not influenced by the statement of defense counsel but directed the first part of his remarks to all counsel and then turned to counsel for Plaintiff-Intervenor and observed that "I do not hesitate at all to say to you, Sir, that many of these questions are not only immaterial, but they are bordering on the ridiculous" (Tr. p. 329). The fact that the court was not directing his first general remarks to counsel for Plaintiff-Intervenor is demonstrated by the court's re-

sponse to another statement by that counsel when the court said, "No. I do not want to reprimand you at all. I just want you to limit your questions to the issues in this case. I think you have gone entirely too far on some of your cross-examination. It is repetitious". (Tr. p. 330).

The emphasis which Petitioners have applied to the excerpts from the trial record which appear in Petitioners' appendix is completely misleading and seems to be an attempt to pervert the record as it actually appears. Any fair reading of the original record will show that the Trial Judge was merely trying to control the conduct of the trial and keep the evidence to the issues. In this instance he was merely telling counsel for both sides to stop bickering and keep to the case. The only error the court could possibly be said to have made was in referring to the examination of the witness as cross-examination when it was in fact direct examination. However, in view of the nature of the questions, the court's classification of the examination as cross-examination is quite understandable.

Petitioners' Further Complaints:

It seems unnecessary to belabor the issue by further specific argument as to each of the Petitioners' complaints as to the conduct of the examination.

The issues which Plaintiff-Intervenor was required to prove were these:

(1) That Sol Meyer had furnished the capital to organize and operate Family Loan Company and that the Defendants held the stock and evidences of indebtedness of that company as the fraudulent voluntary transferees of Sol Meyer;

(2) That Ferd Meyer had been the owner of a substantial amount of the stock and evidences of indebtedness of Family Loan Company at the time he filed voluntary bankruptcy and that he had fraudulently failed to schedule these assets in the bankruptcy proceedings and that the Defendants owning the stock in the company were the fraudulent voluntary transferees of Ferd Meyer.

The Plaintiff-Intervenor failed to offer any proof in support of either of these propositions.

Plaintiff-Intervenor had failed to take any pretrial discovery whatsoever. It is admitted that on pretrial discovery depositions the Plaintiff-Intervenor could have properly asked most of the questions which he sought to propound during the trial, on the theory that the answers to those questions might lead to the discovery of names of witnesses who could give informative testimony or that the answer might open other avenues of inquiry which might lead to information to support the Plaintiff-Intervenor's claims.

But the time for that type of interrogation had passed when the case was called up for trial. We acknowledge that when persons are charged with fraud, the opposing party is entitled to some latitude in interrogating those parties, but that latitude does not go so far as to examine into matters that are not properly within the issues of the case.

There were two critical dates involved in the claims of Plaintiff-Intervenor.

(a) The Plaintiff was required to prove that Sol Meyer furnished the capital of the company and owned the stock and evidences of indebtedness between March, 1930, when the company was organized, and November 18, 1939, when Sol Meyer died;

(b) The Intervenor was required to prove that Ferd Meyer owned stock in the company and evidences of indebtedness during the period from September 20, 1922, the date on which the stockholders' liability judgment was recovered against him, and September 18, 1933, the date on which he was adjudged bankrupt.

Plaintiff-Intervenor, not having prepared for trial, had no plan of interrogation and the questions propounded fell into the wandering or fishing classification, which inevitably led to irrelevant and immaterial examination. It was the duty of Plaintiff-Intervenor to submit some evidence that Sol Meyer was the actual equitable owner of the stock and evidences of indebtedness of the company, but he failed to do so, and likewise, it was the duty of Plaintiff-Intervenor to submit some evidence that Ferd Meyer had committed fraud in his bankruptcy proceeding and that in truth and fact he was the equitable owner of stock and evidences of indebtedness of the company during the period between the entry of the judgment and his adjudication as bankrupt, but no evidence whatsoever in support of either of those claims of fraud was submitted to the court. On the contrary, the evidence showed that Sol Meyer was never the owner of any stock or evidence of indebtedness of the company and that Ferd Meyer was not the owner of any stock or evidence of indebtedness of the company at any time prior to 1940. Under these circumstances it becomes readily apparent that when Plaintiff-Intervenor sought to examine the Defendants with relation to the details of the sale of stock to Seaboard, the evidence was irrelevant and immaterial to the case because no foundation had been laid to make such examination relevant. The complete lack of any evidence or even a plan of examination of witness is demonstrated by Petitioners' statement in their appellants' brief, filed in the United

States Court of Appeals for the Fifth Circuit, brief page 35, where they say:

> "We believe this record plainly shows a glaring miscarriage of justice resulting from the District Court's application of the new, subversive, 'rush it through' technique, and the 'it's gotta be done now' dogma, which has recently taken hold in many (not all) federal courts.
>
> "This dangerous dogma, fostered during the last twenty years by left-wingers and subversives in the Government, sometimes aided by gullible do-gooders in and out of the bar—has been secretly designed primarily as a means for rushing and forcing left-wing social litigation through the federal courts, and also as a means to aid subversives by the technique of rushing the investigator or the prosecutor to prevent full investigation and presentation of the facts against them."

This complaint, like the other complaints of Petitioners, was not justified by the record. As the Court of Appeals pointed out in its opinion, nearly two years elapsed between the date on which the case became at issue and the date on which the case was noticed for trial, and over two months elapsed between notification of trial date and date of the pretrial conference, but Plaintiff-Intervenor took no steps during either of those periods to prepare for trial. It is fundamental that there must be an end to litigation, and no one is entitled to a continuance on the ground that he is not ready to proceed with trial unless he has exercised reasonable diligence in every direction in which he claims to be unprepared.

Every complaint made by the Petitioners in this cause stems from the fact that the Trial Judge attempted to conduct the trial in an orderly way, by confining the examination to the issues which the court would be required to

resolve. Plaintiff-Intervenor, having no evidence to support his respective charges of fraud, now complains that the Trial Judge refused to permit him to use the trial forum as an opportunity to make the preparation for trial which they should have made prior to the commencement of the trial.

Termination of Examination of Witness Was Proper:

The Petitioners complained in their appeal and complain here that the trial court committed error in terminating the examination of the witnesses, Maroon and Meyer.

The United States Court of Appeals, Fifth Circuit, held that the judge's conduct was proper.

The record (Tr. p. 421), shows that Hoke T. Maroon was called as witness by the Plaintiff at the opening of court on the afternoon of February 28th and remained on the stand during all of that afternoon. His examination was resumed on the morning of March 1, 1957 (Tr. p. 515), and continued throughout that day. His examination was resumed on the morning of Monday, March 4th (Tr. p. 671), and continued throughout that day. The witness was excused from examination on March 5th, but his examination was resumed on the morning of March 6th (Tr. p. 942), and he continued on the stand throughout that day. The witness resumed the chair on the morning of March 7th (Tr. p. 1048), and continued under examination until the court adjourned for the day at noon.

Just before adjournment Defendants objected to a continuation of the repetitious and immaterial nature of the examination, and the Trial Judge, addressing counsel for Plaintiff-Intervenor, again told him that the court had indicated the primary issues in the case on numerous oc-

casions and observed that Plaintiff could not go behind the bankruptcy proceedings unless he made a showing of fraud, and that

> "What happened in 1953 is certainly immaterial. What happened in 1936 to 1938 or 40, we have gone all over that. None of that is material unless you have laid your foundation for it, and I would like to have some evidence, if you have it, as to how Sol Meyer was interested in those two or whether Ferd Meyer failed to list all of his assets." (Tr. pp. 1074-1075).

and in response to a long statement by counsel for Plaintiff-Intervenor, the court said:

> "I just want you to show me something that I can point to as competent evidence in support of your allegations." (Tr. p. 1077).

The witness, Maroon, again entered the witness box on the morning of March 8th and continued on the witness stand until the noon recess, at which time the Trial Judge said:

> "You are excused, Mr. Maroon. The court will pass on the type of questions you want to ask him, and if they are proper, we will recall the witness, but your line of questioning now, he has been here two days, and you are doing nothing but just fishing. I am getting tired of it. The court will adjourn until two o'clock." (Tr. p. 1162).

Actually, the witness had been under examination for one-half day on February 28th, all day on March 1st, all day on March 4th, all day on March 6th, a half-day on March 8th, or a total of four and one-half days. On March 7th, during the morning session (Tr. p. 1070) the court had warned counsel for Plaintiff-Intervenor that he was not asking the witness any pertinent questions and that when

the witness left the stand, he would be permanently excused unless Plaintiff-Intervenor had some pertinent questions to ask him. After four and one-half days of testimony, a vast majority of it being immaterial, irrelevant, or repetitious, the court justifiably felt that he was authorized and required to exercise his discretion in controlling the length and extent of the examination of the witness to prevent unnecessary delay of the trial.

> "The duty of a Trial Court requires it to limit examinations of witnesses to the production of evidence affecting the issues. A typical example occurred in the case of *United States* v. *German-American Vocational League*, 153 F.2d 860, in which case the Trial Court terminated the cross examination of a witness after he had been on the stand for two and one-half days under cross examination. The Appellate Court affirmed the Trial Court. And in the case of *United States* v. *Lawinski*, 195 F.2d 1, the Trial Court limited the examination of a witness and on appeal the Court said:
>
> > 'There is certainly a limit to the extent that a witness may be cross examined. Nor is it proper for an able counsel to convert a cross examination into an argument to the jury.
> >
> > 'The trial judge is in the best position to determine how far the cross examination should proceed, and, when convinced that the facts are all presented and fairly before the jury, the examination of a witness, either on direct or cross examination should cease.'
> >
> > 'See also Nashville Interurban Railway v. Barnum, 2nd Cir., 212 Fed. 634 at page 640; United States v. Hornstein, 7th Cir., 176 F.2d 217 at page 220; Radin et al. v. United States, 2nd Cir., 189 Fed. 568 at page 575; Resurrection Gold Min. Co. v. Fortune Gold Min. Co. 8th Cir., 129 Fed. 668 at page

681; Harrold v. Territory of Oklahoma, 8th Cir., 169 Fed. 47 at page 53; Quigley v. United States, 1st Cir., 19 F.2d 755 at page 759; Despiau v. United States Casualty Co., 1st Cir., 89 F.2d 43 at page 44.

United States v. Lawinski, 195 F.2d 1."

The witness, Ferd Meyer, was called to the stand on the morning of February 26th (Tr. p. 86), and remained under interrogation all that day; he resumed testifying on the morning of February 27th (Tr. p. 217), and remained on the stand all that day. On February 28th he was called to the stand at the commencement of the trial and remained under examination until the noon recess (Tr. pp. 374-421). He was recalled to the stand on the morning of March 5th (Tr. p. 833), and remained under examination all day. He was again recalled to the stand on the afternoon of March 8th (Tr. p. 1164), and remained on the stand for the rest of the day. On the morning of March 11th he was recalled to the stand (Tr. p. 1240), and remained on the stand all day, and on the morning of March 12th the witness was again called to the stand by Plaintiff-Intervenor (Tr. p. 1368). The court excused him from the stand late on that afternoon (Tr. p. 1427). The Trial Judge, in excusing the witness, informed counsel for Plaintiff-Intervenor that

> "You have not asked him a single question for more than a day that has not already been asked and I am questioning the good faith of your procedure. The witness is excused."

It is fundamental that the scope and extent of the examination of the witness are matters for the discretion of the trial court, and the scope of the examination should not be extended or permitted beyond what would be fair and reasonable limits. It will be observed that this witness had been under examination for six days and that

the Trial Judge was of the opinion that the examining counsel had been trifling with the court for a considerable amount of that time and that he had had more than ample opportunity to elicit from the witness any information which could be obtained affecting the issues before the court. Under these circumstances it seems that far from being a prejudiced tribunal, the court had exhibited extreme patience and impartiality and had given counsel every opportunity to produce facts in support of the allegations if any such facts existed.

SUMMARY AND CONCLUSION.

The preliminary part of the brief contains specific answers to the charges made by the plaintiff in the petition for certiorari, but briefly summarized the charge as made in view of the record do not support the claim that this Court should exercise its admitted jurisdiction on the grounds of certiorari for the following definite reasons:

1. There is no charge that the lower Court ruled erroneously in applying the law to the facts as presented.

2. There is no claim made that the mass of evidence that was introduced in the lower Court represented through the voluminous books, records, auditors' reports, and some twelve days of testimony was not sufficient to support the findings of fact by the lower Court.

3. There is no claim therefore that the findings of fact as made by the Trial Judge, and sustained by the United States Court of Appeals, Fifth Circuit, was not ample to support the judgments arrived at.

4. There is no claim that the District Court Judge was or could have been subject to disqualification under the terms of Section 144 of 28 U.S.C.A.

5. This Court has many times held that certiorari would not be granted to answer questions by petitioner claiming that a review of the evidence is sought, or when the petitioner seeks to review inferences drawn from the evidence. *General Talking Pictures Corporation* v. *Western Electric Co.*, 304 U.S. 175, 82 L. Ed. 1273, 58 S. Ct. 849, *U. S.* v. *Johnson*, 268 U.S. 220, 16 L. Ed. 925, 45 S. Ct. 496, *Southern Power Company* v. *North Carolina Public Service Co.*, 263 U.S. 508, 68 L. Ed. 413, 44 S. Ct. 164.

6. There is no claim made that the lower Court committed any harmful error in making any rulings as to the admission or non-admission of evidence with the exception of the several points which were passed on squarely by the Court of Appeals, and reflected in its opinion. However because of the generalities of the attack made in the petition in which it is apparently claimed that the Judge in the Court below, the Trial Court was prejudiced and biased, and that the action of the Appellate Court was either biased or erroneous, we have sought to point out in the preliminary part of this brief certain basic and undisputed facts that appeared in this record which consist for the large part documentary evidence, books and records which were all open for public inspection for many years. If there was any error, which we do not concede, and which the Court of Appeals could not find, it certainly was of such minor nature that it could not come within the rule.

7. The question of the evaluation of the evidence, and the control of the taking of testimony lies largely within the discretion of the lower Court, and when reviewed by the U. S. Court of Appeals the decisions of this Court show that certiorari will not be granted to review the factual determinations.

The decisions relied upon by the petitioner are not in point. We think this petition is governed by the decision

of this Court in *Houston Oil Co. of Texas et al. v. Goodrich et al.*, 245 U.S. 440, 38 Sup. Ct. Rep., p. 140, 62 L. Ed. 385, in which this Court held the refusal of the District Court to submit certain Instructions to the Jury on the ground that there was not evidence enough to warrant a finding thereon in favor of the parties asking submission, when approved by the Circuit Court of Appeals will not be reviewed by the Supreme Court on certiorari, in the absence of some sufficient reason. In the body of the opinion THIS Court said:

> "As grounds for granting the writ petitioners alleged that the trial court erred in refusing to submit to the jury (1) whether the deed first dated was in fact executed; (2) whether it was presented for record before execution of the later one; (3) whether vendee in the junior deed was a bona fide purchaser for value; (4) whether the junior deed was forged; and (5) whether the action was barred by the three year statute of limitations. The propriety of submitting these matters depended essentially upon an appreciation of the evidence. Having heard it all, the trial court concluded there was not enough in support of any one of petitioners' above-stated claims to warrant a finding in their favor, and the Circuit Court of Appeals reached the same result. 226 Fed. 434, 141 C.C.A. 264.
>
> "The record discloses no sufficient reason within the rule long observed why we should review the judgment below. Forsyth v. Hammond, 166 U.S. 506, 17 S. Ct. 665, 41 L. Ed. 1095.
>
> Dismissed."

8. It is apparent from the record that the District Judge acted wholly within the scope of his rights and his duty, and that there was no misconduct, prejudice, or bias shown in the record.

It has been definitely pointed out that in 1932 the Florence Meyer Trust was created, and that trust instrument was recorded in Indiana, and made a matter of public record in the County. The Meyer-Kiser Bank had been located where the parties resided. The purpose of that trust was for the protection of certain children who were mentally incapacitated. After the Meyer-Kiser Bank closed, litigation ensued, and as reflected in the opinion of the Appellate Court of Indiana, reported in 37 N.E.2d 291 it is apparent that in the litigation brought by the Petitioner's predecessor in Indiana, all of the transactions with reference to Sol Meyer and his relationship to the Bank, and the placement of the proceeds of money which he is alleged to have taken from the Bank was all set forth. The opinion shows the tracing of the affairs of Sol Meyer from 1931, up to the time of his death in 1939. It was found that he had contributed certain moneys to the Meyer-Kiser Bank Realty Company, to the Meyer-Kiser Bank of Miami, Meyer-Kiser Corporation, United Securities Corporation, and Floridan Hotel, most of them Florida corporations. That suit, upon which this final opinion was predicated, was filed by Thomas E. Garvin as Receiver, appointed by the Marion Circuit Court of Indiana on May 4, 1933, or one year after the Florence Meyer trust had been recorded on the records of Marion County. We mention this fact because it is apparent that there was a thorough investigation in the Courts of Indiana of all of the transactions of Sol Meyer. The parties were all alive at that time, the records were all clear, and the witnesses who had knowledge of the transactions were all alive. This was a personal suit and Sol Meyer was defendant in that case, and personally served, and yet there does not appear anywhere in that record any claim that Sol Meyer had given, or diverted any funds to his wife Florence Meyer, or to the Florence Meyer Trust.

The records show a most thorough analysis of the Sol Meyer transactions, and certainly the assets in that trust would have been revealed, if anyone had conceived or imagined they had in any way come from Sol Meyer as a result of any illegal conversion of funds.

The Family Loan Company in Miami had been formed in 1931 so that in a period of five years of litigation no one contended that the assets in the Florence Meyer Trust were even under suspicion.

When Sol Meyer died in 1939 his estate was administered in Dade County, Florida. The transcript of the record which was filed in Case No. 13,488, United States Court of Appeals, Fifth Circuit, filed April 5, 1951, which is made a part of the record in this final review, show (beginning p. 102) that on the 22nd day of May, 1944, Ferd Meyer Administrator C.T.A. of the Estate of Sol Meyer was granted a final discharge by the County Judge of Dade County, Florida.

Before that discharge had been entered, on the 16th day of May, 1940, and during the progress of the administration proceedings in Dade County, Thomas E. Garvin as Receiver of the Meyer-Kiser Bank in Indianapolis, Indiana, instituted creditor's bill in the Circuit Court of the Eleventh Judicial Circuit in and for Dade County, Florida, in Chancery No. 63001, in which it was sought in that Court to trace the proceeds of property alleged to have been conveyed to the Trustees or to Ferd S. Meyer as Trustee, or to Ferd S. Meyer, individually. A photostatic certified copy of that entire record was introduced in the Court below in this trial (Tr. p. 1453, RV 102). It shows that one of the attorneys of record in this case, Mr. Leo S. Julian, was attorney for the Receiver in that case, and the record shows that there was controversial

litigation, pleadings were filed, extensive testimony taken, with petitions for extension of taking of additional testimony filed time after time. This litigation in the State Court extended over a period of several years. The cause instituted on the 16th day of May, 1940, was referred to a Master on June 11, 1943. Considerable testimony was taken before the Master, which was all shown in the record beginning on page 180. Plaintiff's exhibit 4 entered before the Master in that case (See RV 222) shows the original indenture of trust from Florence S. Meyer to Sol Meyer and Ferd S. Meyer, as Trustee, which had been filed in the Public Records of Marion County, Indiana, on November 28, 1932. A determination of that trust was an issue in the case. The record further discloses that on the 25th day of September, 1943 (shown at Tr. p. 241), the Circuit Court of Dade County, Florida, after reviewing the pleadings, and the evidence, and Master's Report, found:

> "that said evidence wholly fails to show that Sol Meyer ever conveyed to the Defendants, or either of them, any property, real, personal or mixed, as alleged in said Bill of Complaint and that, therefore, the Plaintiff has wholly failed to maintain by competent evidence the material allegations of his said Bill of Complaint."

The cause was dismissed.

Since there was no testimony and no claim in the proceedings in Indiana relative to the Family Loan Company and the Florence Meyer Trust, and since the decision in the Circuit Court of Dade County, Florida, in 1943, found specifically that Sol Meyer had never transferred any of his funds to the Trustee or to the Family Loan Company which was mentioned in the testimony, and since the Florence Meyer Trust was the subject matter

of that litigation among other things, it is apparent that there was no testimony known or found by any of the parties from 1933 up to 1943, which could have been the basis of a legitimate charge. That decision of the Circuit Court, Dade County, Florida, was *res judicata* on issues pertaining to the Florence Meyer Trust or the assets of the Florence Meyer Trust, or the relationship of Sol Meyer with the Family Loan Company between 1931, when it was organized, and the date of his death. See recent decision by the United States Court of Appeals, Fifth Circuit, 266 Fed. Rep. 2d, p. 722, *William H. Matthews, Appellant,* v. *Lulu M. Wolvin and Olive M. Matthews, as Surviving Trustees of Alliance Investment Corporation et al.* The District Court Judge who had originally heard the preliminary part of this case, and who passed upon the pleadings in the case, and upon this proceeding in the State Court, has held that those proceedings were conclusive. The United States Court of Appeals for the Fifth Circuit sent the case back for trial on factual matters because as pointed out in their several opinions there were additional allegations of concealment, and the Court felt that there should be a trial on the facts.

We respectfully say that all factual matters that could be established had been thoroughly passed on by the Florida Court, and that the matters set forth therein were *res judicata*.

Now, in the trial before the District Court in this case, it was incumbent upon Mr. Peckham who was simply the successor of Garvin to show additional facts or circumstances. There was involved in this final trial the collateral feature about the bankruptcy action filed by Ferd S. Meyer in 1933, and the entire bankruptcy file

in that case was introduced as an exhibit (RV 2-162). When that file was introduced it clearly disclosed that the judgment against Ferd S. Meyer was set forth in the schedules, was duly scheduled, notice promptly given, and that Mr. Garvin through his attorneys appeared in that case, and there was a proper final discharge in that case. There was no attempt made to dispute any of those facts before the District Judge who heard all of the evidence in this case.

As aptly pointed out by the United States Court of Appeals, Fifth Circuit, in its opinion of affirmance, the lower Court had permitted plaintiff's counsel some 12 days in which to produce some evidence to support these additional allegations. All of the evidence which had been presented in the State Court was reproduced. In addition thereto there were volumes of records and complete auditors' reports showing the whole transactions of the Family Loan Company which was semi or a *quasi* banking institution under the control of the Florida authorities. After some 12 days, as was pointed out by the Court in its opinion, and approved by the United States Court of Appeals, Fifth Circuit, there was no evidence which had been submitted which supported the claims of the petitioner. The lower Court held that there was ample evidence to sustain the position of the defendants, and there was no evidence to sustain the position of the plaintiff, the petitioner herein.

Now the sole point of attack here is that because the lower Court made certain rulings and made certain findings of fact that the District Judge who tried the case evidenced bias, and therefore prejudice, and that this Court should review the case.

We respectfully say that this petition does not present the type of case which would call for any intervention by this Court on certiorari, and petition should be denied.

Respectfully submitted,

WILLIAM GRESHAM WARD,
GARLAND M. BUDD,

By .....,
Attorneys for Respondents.

CERTIFICATE OF SERVICE.

I Hereby Certify that on this the ..... day of , 1959, I mailed a copy of the foregoing Brief to Leo S. Julian, Biscayne Building, Miami, Florida, and to Jay E. Darlington, 306 Hammond Building, Hammond, Indiana, Attorneys for Petitioners, and to Louis S. Bonsteel, 1301 duPont Building, Miami, Florida, Attorney for Respondent, Seaboard Finance Company.

GARLAND M. BUDD and
WILLIAM GRESHAM WARD,

By .....,
Attorneys for named Respondents.